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Supreme Court of the United States

No. 73-1636

October Term, 1973

HOWARD SOKOLSKY, JEROME FRIEDLANDER, RICHARD PHILLIPS,

Petitioners,

vs.

CLE-WARE INDUSTRIES, INC. and THE "1300 GROUP,"

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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Supreme Court of the United States

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Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

The petitioners, Howard Sokolsky, Jerome Friedlander and Richard Phillips respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. The entire opinion is reprinted and appended to this petition. The opinion of the Referee in Bankruptcy (now Bankruptcy Judge) is not reported. The entire opinion is reprinted and appended to this petition. The judg-

ment entries of the United States Court of Appeals and the United States District Court are reprinted and appended to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1974. This petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, by judicial decree, can vitiate General Orders in Bankruptcy Nos. 44 and 56 promulgated by the United States Supreme Court, now in full force and effect insofar as Chapter XI is concerned.

2. Are the debtor and debtor in possession one and the same person within the meaning of the Bankruptcy Act, so that the local court may *not* appoint, in conformity with the Supreme Court's bankruptcy rules, an *independent* attorney to examine the affairs of the debtor, participate in the conduct of its business and the formulation of plans to rehabilitate or liquidate the debtor.

3. What are the standards of review applicable to appeals to the Courts of Appeal in bankruptcy causes where Petitions for Review have been heard and determined by the United States District Court. Otherwise stated, where there has been review of the determinations of the Bankruptcy Judge by the United States District Court, should the standard of review, revision or reversal by the Circuit Court be based upon the "clearly erroneous" or the "clear mistake" rule.

STATUTORY PROVISIONS, BANKRUPTCY RULES AND GENERAL ORDERS INVOLVED

The statutes, general orders and bankruptcy rules, summarized below, are set out verbatim in the appendix hereto.

11 U.S.C. Sec. 732, 52 Stat. 908, Bankruptcy Act, Section 332. This provides for the bankruptcy court to appoint a receiver, if necessary; or to continue the debtor in possession.

11 U.S.C. Sec. 742, 52 Stat. 909, Bankruptcy Act, Section 342. This provides for the debtor to continue in possession where no trustee or receiver has been appointed. Such possession *must* be under control of the *local* bankruptcy court under conditions which the *local* bankruptcy court prescribes.

11 U.S.C. Sec. 743, 52 Stat. 909, Bankruptcy Act, Section 343. This permits the debtor in possession, upon authorization by and subject to the control of the bankruptcy judge, to operate the business and file such reports as the local bankruptcy court may designate.

11 U.S.C. Sec. 76; Section 48 of the Bankruptcy Act. This provides for compensation of receivers, both as custodians (1) and with full powers to operate the business, subsections (2) and (3).

General Order in Bankruptcy No. 42 which requires the bankruptcy court to allow compensation to attorneys for the receiver, trustee or debtor in possession.

General Order in Bankruptcy No. 44 which prescribes the requirements and qualifications for the appointment by the bankruptcy court of any attorney for a receiver, trustee or debtor in possession. This General Order is now embodied into Bankruptcy Rule 215, applicable to Chapters

I-VII and will be carried into the revision of Chapter XI Rules in Rule 11-22.

General Order in Bankruptcy No. 56, which permits courts of bankruptcy, by action of a majority of the judges thereof, to make *local* rules governing *local* practice in proceedings under the Bankruptcy Act.

Rule No. 927 of the new Bankruptcy Rules of the Supreme Court, applicable to Chapters I-VII of the Bankruptcy Act, permitting each district court, by a majority of judges thereof, to make *local* rules governing its *local* practice in proceedings under the specified chapters.

Local Bankruptcy Rules of the United States District Court, Northern District of Ohio, particularly Rule 8 (formerly Rule 12), and particularly subsection (b) of that rule. This subsection outlines the requirements for specific detail to be attached to each application for attorney's fees in (b) 3, sets out the criteria by which the reasonableness of any attorney's fee shall be determined.

STATEMENT OF THE CASE

The particular facts of this appeal are secondary to the critically important aspects of the administration of the Bankruptcy Act.

It is respectfully urged that the decision of the Circuit Court of Appeals critically affects the administration of the Bankruptcy Act (*New York v. Saper*, 336 U.S. 328, and more recently, *Reading Co. v. Francis Shunk Brown*, 391 U.S. 471, 20 L. Ed. 2d 751).

To the extent necessary to understand the factual backdrop of this petition, it is of moment only to restate here some of the basic facts as they existed when these proceedings had their genesis. We quote excerpts from pages 2 and 3 of the opinion of the Court of Appeals:

The Facts

"This proceeding was commenced on February 18, 1971, by the filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act by Cle-Ware Industries, Inc. (Cle-Ware). Approximately one week later similar petitions were filed by nine subsidiary corporations of Cle-Ware. All of the corporations were encountering financial difficulties and sought court-assisted rehabilitation. For purposes of more efficient administration, the cases of the ten corporations were consolidated by the Bankruptcy Court on March 3, 1971.

The debtor corporations were involved in the nationwide distribution and warehousing of automotive parts and accessories and hardware and plumbing parts and supplies. Corporate facilities were operated in Cleveland, New York, Atlanta, California and Puerto Rico, while the Cle-Ware Rayco, Inc. subsidiary maintained 159 retail outlets throughout the entire United States, in addition to a Rhode Island manufacturing plant. The total enterprise employed hundreds of people in various parts of the country and produced an annual sales volume of about $44 million.

At the time of the arrangement, unsecured creditor claims totaled over $15 million and secured creditor claims aggregated over $4 million. * * * The Cle-Ware enterprise was revived by the plan of arrangement and is in full operation today.

When the arrangement proceedings began, the Bankruptcy Judge authorized the debtor-in-possession to continue to operate the corporate business. Attorneys Howard L. Sokolsky and Jerome Friedlander were appointed by the Bankruptcy Judge as counsel

for the debtor-in-possession under a general retainer pursuant to General Order 44 of the General Orders in Bankruptcy."

The Court of Appeals then glossed lightly over the fact that the court of bankruptcy had refused to appoint a receiver (p. 13, Ct. of App. opinion).

The local court refused to do so because of its own *local* practice, under favor of General Order 56 applicable to all bankruptcy proceedings (now Bankruptcy Rule 927 *only* insofar as Chapters I-VII are concerned) to avoid the allowance of compensation required to be allowed to receivers under 11 U.S.C. § 76. (See Bankruptcy Judge's Opinion, p. 2; Ct. of App. opinion, p. 13.)

The bankruptcy judge (then referee) appointed (pursuant to application under General Order No. 44) *independent* counsel for the debtor in possession, requiring reports on a daily basis as to the conduct of the debtor's business, particularly with reference to applications for disbursements of its income and distributions of its assets (11 U.S.C. 743).

The debtor (later the debtor in possession) retained its *own* counsel, as allowed by law, so that the combined skills of debtor and *its* counsel could be utilized in the promulgation of a plan of arrangement and the daily conduct of the business as it was affected by past legal problems.

There finally evolved a successful plan of arrangement. It is in operation today (p. 3, Ct. of App. opinion).

The plan of arrangement was confirmed on October 13, 1971. The deposit to fund the plan to cover priority claims, payments to general creditors, and costs of administration was made by the debtor and by a group of new investors, self-designated as the "1300 Group". These were

the actual parties who filed the appeal to the Court of Appeals and who are the sole persons named as respondents in this petition, having any interest in the outcome of these proceedings.

After the making of the required deposit under the plan, the confirmation of the plan, and the order of the bankruptcy court (App. Vol. 1, p. 14) these petitioners filed their combined *single* application for *single* compensation. (See App. Vol. 1, p. 3—Relevant Docket Entries.)

Within the week after the filing of the application, notices of the hearing on the application for compensation were sent by the bankruptcy judge to all interested parties, including the debtor and the "1300 Group." The hearing was set for two weeks later.

At the date of the scheduled hearing, the debtor requested that it be afforded another week to prepare for the hearing (App. Vol. 1, p. 3). That delay was granted.

On the date of the postponed hearing, the "1300 Group," the debtor and their counsel were present. The applicants for attorneys' fees, the petitioners herein, were in court. The objectors were given the opportunity to present testimony and to cross-examine the fee applicants. That was the very first appearance counsel for the objectors had made during the entire proceeding.

The objectors presented no evidence. They did not cross-examine any of the petitioners who were present. However, they did file written objections and made extensive arguments (App. Vol. 1, pp. 4, 190 and 208).

On July 17, 1972, the bankruptcy judge, in a 21-page opinion, considered the written objections and the briefs relating thereto and their extensive arguments. The court reduced the fees requested. It made and entered an order of allowance.

Pursuant to the local rules of the bankruptcy court, these respondents filed a Petition for Review (local Rule 16 (b), now Rule 17).

On November 20, 1972, the United States District Court affirmed the findings and orders of the bankruptcy judge (App. Vol. 1, p. 212).

An appeal was perfected by these respondents to the United States Court of Appeals for the Sixth Circuit. On Feb. 26, 1974, the Circuit Court reversed the order of the United States District Court and remanded the cause to the *District Court* with directions to conduct evidentiary hearing on the "objections of the debtor corporations, that *counsel be required to substantiate their fee requests under the guidelines set forth in this opinion*, and that the *objecting parties be afforded the right of cross examination...*" (Ct. of App. opinion, p. 13).

REASONS FOR GRANTING THE WRIT

1. The judgment and order of the Court of Appeals vitiates and emasculates General Order in Bankruptcy No. 56 of the United States Supreme Court, presently applicable to Chapter XI proceedings.

> "This court strongly disapproves the practice of appointing separate counsel for the debtor-in-possession and at the same time compensating another attorney at the expense of the bankrupt estate in his capacity as counsel for the debtor for services rendered after the filing of a petition for a plan of arrangement. *Hereafter we will not approve this procedure as a general practice in the Sixth Circuit*—we see no valid reason why, as a general rule, his legal representation in both capacities (debtor and debtor-in-possession) should not be limited to one attorney or one set of attorneys." (Opinion—Ct. of App., p. 12) (Italics ours)

If this order is permitted to stand, General Orders 44 and 56 have no meaning or purpose. That order effectively will destroy *local* judicial control over Chapter XI proceedings.

Prior to the enactment of the Chandler Act in 1938, there was no Supreme Court General Order which vested in the *local* bankruptcy courts the authority to promulgate *local* rules of practice to govern proceedings under the Bankruptcy Act.

While most of the House debates centered about appellate jurisdiction to hear appeals of "controversies" and "proceedings" arising out of disputes under the Bankruptcy Act, it is significant that courts of appeals, *until 1938*, had the power to *"superintend"* and "revise" the *"proceedings"* of inferior courts of bankruptcy.

Even the final draft of the revision (House Report No. 1409, July 29, 1937, p. 70) contained recommended powers "to superintend" similar to those contained in the Act of 1898.

In the statute which finally became law, the power to *"superintend"* was taken from the appellate courts. They were left with such appellate jurisdiction in law and equity as was thereafter vested in courts that were *not* "bankruptcy courts" and whose jurisdiction was solely appellate (COLLIER ON BANKRUPTCY, Vol. 2, 14th Ed., Section 24, p. 718).

The change in and revision of the House Report recommendation accorded with the purposes of the Chandler Act which greatly enlarged the powers of the local referees and the reviewing authority of the district courts.

The revisions effected by enactment of the Chandler Act, effective Sept. 22, 1938, granted the referees extended

and *independent* authority, subject to district court review, to act in bankruptcy matters, as a *bankruptcy court*, particularly in matters arising under Chapter XI.

As stated in the House Report (accompanying H. R. 8046, 75th Congress, July 29, 1937, p. 34):

> "(2) Jurisdiction in discharge and arrangement (composition) cases - Section 38 a (4), (5): giving referees jurisdiction to grant, deny, or revoke discharges and to confirm, arrangements (compositions) . . . The new jurisdiction would, of course, be exercised subject to review. Under the law as at present, referees usually hear these matters on reference to them as special masters and report back to the judges. This is an unnecessary and undesirable circumlocution. *The referees have opportunity not only to hear but to observe the witnesses and by reason of their direct contact, in better position to determine the questions at issue than the judges, whose only information is given them by the referees. These amendments are recommended in the interest of expediting the proceedings and saving expense.*" (Italics ours.)

The need for *independent judicial* control over the debtor's business, when he remained in possession, had been emphasized in the statement of now Justice William O. Douglas, then chairman of the Securities and Exchange Commission, one of the witnesses before the House committee. While his remarks were addressed primarily to abuses in corporate reorganizations, his comments covered proceedings which then included arrangements and compositions (House Report No. 1409 at p. 37):

> "The record also shows, with overwhelming proof, that plans of reorganization were frequently dictated by a single interest—by a closely knit inside group;

primarily in the interests of that group and of dubious wisdom so far as interests outside the inner circle were concerned. These conclusions have indeed become so generally accepted and so widely known as to be commonplace. These conclusions indicate that something must be done to provide impartial, capable control over reorganizations; to produce impartially fair and sound plans of reorganization; and to provide effective motive power which will lead to the production and consideration of reorganization plans.
* * *

Under section 77B as it now stands, there is no duty, and no real opportunity, to make an examination and appraisal of the management of the debtor. The debtor may remain in possession of the property; or one of its officials may be appointed trustee for the debtor. As a matter of fact in over a majority of cases the debtor remains in possession, a strange and novel privilege for debtors in a bankruptcy proceeding or even in a receivership proceeding.

And at p. 38:

Obviously reorganization is not strictly a legal problem. It is a business and administrative matter of great complexity. And even though the courts wanted to exercise a broader conditioning influence over the whole process, they frequently were in no position to do so, since they did not have nor were they in a position to get the facts. The bill recognizes this weakness in the system. It makes it necessary for the courts to deal with the business and administrative problems of reorganization. It makes it possible for the courts to do so by giving them administrative and expert assistance. In that way it vitalizes

> the role of the courts. In a variety of ways, it brings the court into association with the facts of the business; it assures that the court will be fully informed; it places in the court power to give impetus to a reorganization—to see that a plan is drafted and that moves are made to get the support of investors; and it gives the court genuine power to see to it that the reorganized company is provided with good management and a sound capital structure. In the public eye, the courts already have the responsibility; what the courts need are ample powers commensurate with their actual or ostensible responsibility. * * *"

Mr. Justice Douglas' latter observations, directed as they were to proposed Chapter X under the Chandler Act proceedings, are pointedly applicable to the revisions effected by corporate arrangements under existing Chapter XI.

In implementing the Chandler Act, particularly as concerns the jurisdiction of the courts of appeal, the *deletion* of the power to *superintend,* was consonant with the new definition of the courts of bankruptcy. (See 11 U.S.C. § 11; COLLIER, Vol. 1, Ch. 2, 14th Ed., p. 142.)

The limitations on appellate review are illustrated in the section by section comparisons under the 1898 Act (reflected by the proposed Chandler Act) and the actual statutes which emerged from the House and Senate committees. (COLLIER, Vol. 2, Ch. 24, 14th Ed. notes, p. 714.)

In order to effect the purposes of the new statute, to vest *local* control of bankruptcy proceedings in the *local* courts, the United States Supreme Court adopted, for the *first* time, General Order 56, entitled "Rules by Courts of Bankruptcy."

Under favor of that General Order the court of bankruptcy for the Northern District of Ohio by a majority of the district judges, adopted local rules providing for appointments of receivers (now BR-5) and attorneys for receivers (now BR-8).

Under the *local* practice, the bankruptcy court concluded it would not appoint a receiver, even upon application of a debtor under a Chapter XI proceeding, where the business of the debtor was extensive, geographically diverse and particularly where there was a *large cash flow.*

The reason this practice developed under the *local* rule was the desire of the *local* bankruptcy court (under General Order 56) to avoid paying burdensome receiver's commissions as required by 11 U.S.C. § 76 (2) where the operation of the business was to be continued. The local practice, as in most jurisdictions, was to appoint a receiver under such circumstances where the going business did not generate a large cash flow.

Independent judicial supervision could *only* be effected and the receiver's commissions *avoided,* by maintaining the debtor in possession; but requiring him, pursuant to General Order 44, to make application to the court for appointment of a disinterested attorney who would operate under the court's direction and supervision.

Under favor of General Order 44, the local bankruptcy court could require such reports as it deemed necessary to protect the assets of the estate and through disinterested counsel keep judicial control of the receipts and disbursements of the debtor's going business.

The local bankruptcy court could, had it chosen to do so, appoint a *receiver.* He, in turn, under General Order 44, could seek *independent* counsel.

Those powers were intended to be and were invested in the *local* court of bankruptcy. (See Revision of the Bankruptcy Act, Hearing before the Committee on the Judiciary, House of Representatives, H. R. 6439, revised as H. R. 8046, 1937, p. 74, 75.)

As Harold Remington of New York (author of REMINGTON ON BANKRUPTCY) testified (p. 229-230 of the House hearing) in advocating administration of the Act under the Supreme Court's Rules and *local* practice:

> "For more than a generation we got along without muddling up the statute with rules of procedure, and by leaving the formulation of such rules of procedure to the Supreme Court and the *district* courts and so forth, most of whom are quite capable of framing rules of procedure to carry out any fundamental changes that might be made." (Italics ours)

Perhaps the most cogent observation, while addressed to desirability of independent judicial control of a *Chapter X* proceeding (but equally applicable to Chapter XI) was made by Hon. John C. Knox, senior judge of the United States District Court, for the Southern District of New York (House Hearing, ibid., at p. 367):

> "Judges who are to administer the act are either competent or incompetent, and they are either honest or dishonest. If they are incompetent or dishonest, then they ought to have nothing to do with these reorganizations at all. If they are competent and honest, then you must vest them with a very wide discretion in dealing with reorganizations. There are hardly any two that can be placed in the same group. Each one has a different set-up; each one faces different conditions. One may be almost local in character; another may be a far-flung enterprise that must enter into competitive conditions with financially

strong institutions and those that have the best possible management. . . ."

And, upon the necessity for appointing an independent trustee (in Chapter X cases) Judge Knox emphasized the need for the *local* court of bankruptcy to have full discretion in reorganization cases (here, Chapter XI):

> "Now, all corporations and their managements are not bad. Competition, a strike, a bad season, a variety of other circumstances may make it necessary for a corporation to come to court for assistance. A corporation in its management may be known to the court. The conditions that brought it to court may be open to anybody of intelligence and who is interested in the situation. Why, under conditions of that kind, should it be obligatory upon the court to appoint a trustee upon the filing of the petition? If disclosures and investigation indicate that a trustee is to be appointed or should be appointed, then let the appointment be made."

No one who reads the hearing testimony and the House and Senate reports can doubt that the Congress intended two things: (a) to leave to the Supreme Court the rule-making powers to govern administration of the Bankruptcy Act, and (b) to grant to the *local* courts of bankruptcy the singular power to implement those rules as local conditions and the specific case required.

The Chandler Act did *not* give the Court of Appeals any policy or rule-making powers. It specifically *deleted* that power in the Act in its statutory form.

If the decision of the Circuit is permitted to remain as the law in the Sixth Circuit, General Order 56 is meaningless. Hereafter local rules can be emasculated by appellate judicial fiat.

General Order 44

No question ever has been raised as to the right of the Chapter XI debtor to engage its own counsel and that the fee of such counsel is a proper charge as a cost of administration in a Chapter XI proceeding (p. 21, Ct. of App. opinion).

What would appear to have been decided by the Circuit Court (pp. 13, 14 of opinion) is that General Order 44 does *not* apply to the appointment of the attorney for the debtor, as had been contended by the 1300 Group below.

The residual question of great import is the construction and application of General Order No. 44. Does the *local* bankruptcy court have the right and power to appoint *independent* counsel, upon proper application, and to compensate such counsel pursuant to the Order, notwithstanding the continued engagement by the debtor (later the debtor in possession) of its personally-designated attorney.

It has not been questioned, nor can it be, that the bankruptcy court has the right and authority to appoint a *receiver,* upon proper application (11 U.S.C. § 732; Bankruptcy Act, § 332).

Nor is there any doubt the *receiver* may apply to the court (General Order 44) for the right to engage *independent* counsel.

What the Circuit Court says (if its judgment stands) is that the bankruptcy court in a Chapter XI proceeding *can* allow the appointment of separate counsel if a *receiver* is appointed. But if the *debtor remains in possession,* the personal attorney for the debtor *must* continue as counsel even though he would be entitled to two attorney's fees; one fee as attorney for the debtor, and a *separate* fee as attorney for the debtor in possession.

This practice would result in complete destruction of the bankruptcy court's powers. It is directly counter to the spirit of the Chandler Act, which requires the court to supervise and control the proceedings under Chapter XI, if the debtor remains in possession.

It requires no great foresight to anticipate where the debtor's personal attorney's allegiance would be directed, if controversy arose (as it always does) between creditors and the debtor.

General Order 44 would be meaningless and pointless.

The power of the bankruptcy court to maintain *disinterested* supervision and control of the debtor's estate would be destroyed completely, if the debtor were permitted to remain in possession with his personal attorney.

The *only* alternative the court would have, if it discharged its duties under the law, would be to appoint a receiver. Even the Circuit Court recognized this would increase the costs of administration considerably (p. 13 of opinion). The draft of the proposed revision of Chapter XI rules recognizes this potential burden by placing limitations on the appointment of receivers (Rule 18 B, p. 17).

2. The DEBTOR and the DEBTOR IN POSSESSION are in legal contemplation two distinct and separate entities.

The Circuit Court found (p. 3 of opinion) that the "debtor-in-possession and the debtor were one and the same parties."

At the same time, the court quotes favorably from an article written by Bankruptcy Judge Asa S. Herzog of the Southern District of New York, pointing out (pp. 10-11 of opinion) that their functions as legal entities are "separate and distinct . . ."

The Circuit Court apparently accepted its own premise and then rejected it.

What the Circuit Court failed to note is that the bankruptcy court, where a debtor is in possession and operating the business, has the duty of supervision and control of the debtor's business. The court controls its income and expenditures. (*Matter of Burbank Corp.*, 48 F. Supp. 172, S.D. Cal. 1943).

8 COLLIER, 14th Ed. § 6.25 emphatically notes the important distinctions:

> "Careful distinction must be drawn between a debtor and debtor-in-possession. Whether there is a receiver, or a trustee, or the debtor in possession, the debtor as such possesses certain rights and privileges and is subject to certain duties. If the debtor continues in possession of his property pursuant to § 342, then as debtor-in-possession he has a separate and additional status with incidents of its own."

The degree of responsibility devolving upon the bankruptcy court for *independent* control of the debtor in possession is graphically pointed out in 8 COLLIER, 14th Ed. § 6.30, *General Effect of Continuance in Possession*:

> "The property is in the hands of the court, although the debtor is left in possession, and the 'control of the court is then pervasive.' The fact that the debtor continues in possession does not authorize him to operate his business. That can be done only upon specific authorization from the court pursuant to § 343. If a debtor in possession desires to issue certificates of indebtedness he must secure authorization therefor under § 344. If a debtor in possession wishes to lease or sell any property, he can do so only upon authoriza-

tion from the court pursuant to § 313(2). The possession, title, and powers of a debtor in possession are subject at all times under § 342 'to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe'."

COLLIER (Vol. 8 - 14th Ed.) makes pointed reference to the supervision the bankruptcy court must exercise in a Chapter XI case involving far-flung operations where the debtor-in-possession continues to operate the business. It is stated, at § 6.35:

"—Control of the Court.

The operation of the debtor's business and the management of his property are always 'subject to the control of the court.' That control may be exercised in a variety of ways, and the extent of its exercise will depend upon the circumstances of the particular case. Matters of a common nature which the court might regulate in the exercise of its control are whether checks shall be countersigned, whether purchases shall be restricted, whether purchases and sales shall be made on credit as well as for cash, and whether the number of employees and their salaries shall be fixed or left to the determination of the receiver, trustee, or debtor in possession.

—Reports of Operation or Management.

Where a receiver, trustee, or debtor in possession has been authorized to operate the debtor's business or manage his property, § 343 requires him to 'file reports thereof with the court at such intervals as the court may designate.' *The precise details of the reports, as well as the times when they are to be filed, are left entirely in the discretion of the court,*

thus enabling those matters to be adapted to the needs of the particular case. The details and the times for filing should be prescribed in the order of authorization under § 343. If those matters are fixed by *local rule*, the order of authorization need prescribe only such requirements, in addition to those contained in the local rule, as may be warranted under the facts of the case. The requirements prescribed in the order of authorization may be modified, and new requirements may be prescribed, at any time." (Italics ours.)

The *debtor*, as a separate legal entity, has none of the rights or duties set out above. To whom should the bankruptcy court assign these critical requirements, where the *debtor-in-possession* is operating the business?

The necessity for clear distinctions between the functions and interests of the attorneys for the debtor and independent counsel appointed under favor of General Order 44, is evident from the contradictions found in the opinion of the Court of Appeals.

At p. 12 (opinion) the court states it disapproves the practice of compensating "counsel for the debtor for services rendered after filing of a petition for a plan of arrangement."

The court thus indicates it regards counsel for the debtor as having that specific debtor's professional interest up to the *filing* of the petition.

Yet, at p. 21 (opinion) the Circuit Court outlines eight separate services for which it states it would normally compensate *attorneys for the debtor*, most of them to be rendered *after* the filing of the petition.

It is evident that the court itself recognized two distinct services which it regarded as falling properly within the duties of counsel for the debtor; first, before the filing

of the petition, and later, during the pendency of the proceedings.

The local bankruptcy court alone is aware of the extent to which the expertise of the debtor (later in possession) and his personal attorney who knows the history of the debtor and the legal problems which brought it into court to seek relief under Chapter XI, must be utilized during the course of administration.

The debtor knows best who would be most interested, in his own trade, in entering a plan of arrangement. Its own attorneys already would have been involved in creditor problems. Otherwise, they would not have filed the original petition under § 322 of the Act.

The *local* bankruptcy court, *and it alone*, knows the extent to which the services of debtor's personal counsel can be utilized while the business is *being* operated and particularly in the formulation of a plan of arrangement.

That local control, for the specific purposes of the particular case, may require one attorney to act primarily for the debtor (later debtor in possession) and another to maintain constant supervision and control for the benefit of creditors and the court. That is the principal purpose of General Order 44, permitting appointment of independent counsel.

There should be no doubt that the legal identity, interests and purposes of the debtor who has sought the protection of the bankruptcy court, and those of the debtor in possession may conflict in the formulation of a plan of arrangement, particularly where shareholder or creditor interests are involved.

It is the resolution of these differences which makes possible the evolution of a successful plan under the direction and supervision of the *local* bankruptcy court.

3. What is the standard of appellate review in a Chapter XI proceeding where the District Court has reviewed and affirmed the judgment and order of the bankruptcy court. Is it the "clearly erroneous" standard of Rule 52 (a) of the Federal Rules of Civil Procedure or the "clear demonstration of mistake?"

The Circuit Court of Appeals for the Sixth Circuit apparently has *two* rules under the circumstance (p. 9 of opinion). Each, apparently, applies in certain situations.

There also is conflict between several circuits on the application of the standard.

The Court of Appeals for the Fifth Circuit applies the "clearly erroneous" standard. (*DeMet v. Harralson*, 399 F.2d 35, C.C.A. Fla., 1968).

The Court of Appeals for the Seventh Circuit applies the "clearly erroneous" standard. (*In re Sussin Corp.*, 227 F.2d 121, C.C.A. Ill., *cert. den.* 350 U.S. 995, 1955).

The Court of Appeals for the Third Circuit holds to the "clearly erroneous" standard (*In re Cornucopia Gold Mines*, 267 F.2d 334, C.C.A. Pa., 1959).

In the Court of Appeals for the Sixth Circuit (our circuit) the "clearly erroneous" standard has been applied in some cases (illustratively, *In re Wyse*, 296 F.2d 214, C.C.A. Ohio, 1961) and in others it has employed the rule of "clear demonstration of mistake." (See the two cases noted at p. 9 of the opinion.)

The court rationalized its own different standards of review by the fact that in *In re Nelson & Sons*, 426 F.2d 235, 1970, *cert. den.* 397 U.S. 1038, the *District Judge* "filed an extensive opinion and order in which he detailed his reasons for confirming the findings of the referee. . . ." In the instant case (App. Vol. 1, p. 179) the bankruptcy judge filed a 21-

page opinion detailing his reasons for making the allowances. No purpose could have been served by the *District Court* in filing "an extensive opinion" in affirming the allowances made by the bankruptcy judge, already supported by "an extensive opinion."

The pivotal consideration addressed to this court by this petition is whether there are *two* standards of review where the District Court has reviewed extensive findings of the bankruptcy judge and affirmed.

Is the standard "clearly erroneous?" —Or, is it "clear mistake?"

If there is to be uniformity in the application of appellate standards of review under the Bankruptcy Act, it is respectfully urged that these conflicts must be resolved.

CONCLUSION

The writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit for the following reasons, in order of their import on the administration of the Bankruptcy Act:

1. If permitted to remain the law of the Sixth Circuit, it would effectively destroy the local bankruptcy court's supervision and control over Chapter XI proceedings. It would pervert the intent of Congress in the enactment of the Chandler Act and render meaningless General Order 56.

2. If permitted to remain as the law of the Sixth Circuit it would virtually force the local bankruptcy court to appoint a receiver, who then would apply under General Order 44 for independent counsel in a Chapter XI pro-

ceeding, in order to keep the court advised of the progress toward a plan of arrangement. This would vastly increase the cost of administration, as the Court of Appeals recognized.

3. If permitted to remain the law of the Sixth Circuit the standard of review, where the bankruptcy judge has written an extensive opinion and stated his reasons for his judgment and there was affirmation by the District Court on review, would be in conflict with the court's own standard and that of other circuits.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

(Decided and Filed February 26, 1974)

No. 73-1063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the Matter of
CLE-WARE INDUSTRIES, INC., et al., *Debtor*.

CLE-WARE INDUSTRIES, INC., et al.,
Appellants,

v.

HOWARD SOKOLSKY, JEROME FRIEDLANDER, RICHARD PHILLIPS, FRANK WHALEN and the law firm of KOHRMAN AND JACKSON,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Before PHILLIPS, Chief Judge, and CECIL, Senior Circuit Judge, and ALLEN, District Judge.*

PHILLIPS. Chief Judge. This is an appeal of an order of the District Court which affirmed an allowance of at-

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* Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

torneys' fees entered by a Bankruptcy Judge in a Chapter XI proceeding under the Bankruptcy Act. Jurisdiction is based on 11 U.S.C. § 47.

Few issues in bankruptcy administration are litigated so frequently as the question of attorneys' fees.[1] Yet few areas of bankruptcy law are as clouded by uncertainty about the meaning of statutes, rules and judicial opinions as the area of attorneys' fees. There is, however, agreement that the allowance of fees to an attorney depends largely upon the facts of each individual case.[2] The facts in the present case are set out at length because of the large number of bankruptcy law issues which they raise.

I. The Facts

This proceeding was commenced on February 18, 1971, by the filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act by Cle-Ware Industries, Inc. (Cle-Ware). Approximately one week later similar petitions were filed by nine subsidiary corporations of Cle-Ware. All of the corporations were encountering financial difficulties and sought court-assisted rehabilitation. For purposes of more efficient administration, the cases of the ten corporations were consolidated by the Bankruptcy Court on March 3, 1971.

The debtor corporations were involved in the nationwide distribution and warehousing of automotive parts and accessories and hardware and plumbing parts and supplies. Corporate facilities were operated in Cleveland, New York, Atlanta, California and Puerto Rico, while the

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1. See 3A *Collier on Bankruptcy* ¶ 62.12, at 1497-1505 (14th ed. 1971) for a list and discussion of controverted cases.

2. See 3A *Collier on Bankruptcy* ¶ 62.12, at 1489 (14th ed. 1971).

Cle-Ware Rayco, Inc. subsidiary maintained 159 retail outlets throughout the entire United States, in addition to a Rhode Island manufacturing plant. The total enterprise employed hundreds of people in various parts of the country and produced an annual sales volume of about $44 million.

At the time of the arrangement, unsecured creditor claims totaled over $15 million and secured creditor claims aggregated over $4 million. The plan of arrangement provided that secured creditors would be paid off completely and general creditors would receive five cents on the dollar with a stock option or the possibility of fifteen to twenty cents on the dollar for those who elected to take deferred payments. The Cle-Ware enterprise was revived by the plan of arrangement and is in full operation today.

When the arrangement proceedings began, the Bankruptcy Judge authorized the debtor-in-possession to continue to operate the corporate business. Attorneys Howard L. Sokolsky and Jerome Friedlander were appointed by the Bankruptcy Judge as counsel for the debtor-in-possession under a general retainer pursuant to General Order 44 of the General Orders in Bankruptcy.[3] These appoint-

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3. General Order 44 in Bankruptcy reads as follows:

"APPOINTMENT OF ATTORNEYS

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the es-

(Continued on following page)

ments were made even though the debtor already had retained other counsel, namely Frank C. Whalen and the law firm of Kohrman and Jackson, who never applied to the Bankruptcy Judge for appointment pursuant to General Order 44. The debtor-in-possession and the debtor were one and the same parties, to wit, Cle-Ware and its nine subsidiaries.

The Bankruptcy Judge attempted "to establish rigid boundaries in which the debtor-in-possession was to operate the Cle-Ware empire." Believing that creditors had little faith in the debtor's ability to operate the corporate business successfully, the Bankruptcy Judge required counsel for the debtor-in-possession to devote their legal skills "to overseeing the entire management of the business in order to protect the assets and prevent losses." To attain this result, the Bankruptcy Judge required that all Cle-Ware expenditures "be made only upon application and

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Footnote continued—

tate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. if without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors, or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees of the creditors of the corporation."

order of the Court." Over an eight month period from February 1971 to October 1971, there were 2,487 of these applications submitted to and approved by the Bankruptcy Court.

After a plan of arrangement for all debtors was confirmed by the Bankruptcy Judge on October 13, 1971, the applications for attorneys' fees, which are the subject of this appeal, were filed. Sokolsky and Friedlander, counsel appointed by the court to represent the debtor-in-possession filed a joint application seeking $200,000 compensation. Whalen and the firm of Kohrman and Jackson at the same time filed an application for $180,000 in compensation as attorneys for the debtor.

The attorneys for the debtor also represented Gerald Levine, who owned 165,992 shares of the 394,000 outstanding shares of Cle-Ware stock. They represented Levine in his personal stock negotiations with various parties, including several persons known collectively as the 1300 Group, to whom Levine sold his Cle-Ware stock by an agreement also concluded on October 13, 1971.

The debtor companies, through their new management, filed written objections to the application submitted by the four sets of attorneys, raising serious factual questions about the claims. As to the attorneys for the debtor, it was charged, among other things, that (1) certain of their services were duplicated by the services rendered by attorneys for the debtor-in-possession or should have been rendered by the latter attorneys; and (2) extensive services were rendered on behalf of their personal client, Gerald Levine, the principal stockholder of Cle-Ware, which were not compensable in the bankruptcy proceedings. As to the attorneys for the debtor-in-possession, it was objected that they had failed to document their

services with detailed time records. As to all attorneys, it was charged that they claimed compensation for extensive ministerial and administrative services that were not properly compensable as "professional services," and that counsel had duplicated much work of the administrative personnel of the debtor-in-possession and of each other. Without conducting any evidentiary hearing as to these issues of fact, the Bankruptcy Judge allowed a fee of $162,500 to the attorneys for the debtor and $197,500 to the attorneys for the debtor-in-possession.

The following schema outlines the requests and allowances for the respective attorneys:

Client	Attorneys	Court Approved	Requested Compensation	Allowance
Debtor	Whalen and the firm of Kohrman and Jackson	No	$180,000	$162,500
Debtor-in-Possession	Sokolsky and Friedlander	Yes	$200,000	$197,500
		Total Allowance		$360,000

The appellant debtor companies then petitioned the District Court to review the Bankruptcy Judge's order and to suspend execution thereof, citing as errors the objections to the fee applications that had been overruled by the Bankruptcy Judge and the Bankruptcy Judge's failure to hold an evidentiary hearing. The District Court on November 20, 1972, affirmed the Bankruptcy Judge's Allowance of Fees and Second Order of Distribution in a five line order. From that order, this appeal has been perfected.

II. Principles Governing Bankruptcy Fee Allowances

In determining whether the fees awarded counsel were excessive, we are guided by the economic spirit of frugality that underlies the Bankruptcy Act. In *In re Mt. Forest Fur Farms of America, Inc.*, 157 F.2d 640, 644 (1946), this court, speaking through Judge Martin, said:

> " . . . the policy of the Bankruptcy Act, manifest in all its provisions regarding expenses and fees, is to reduce to a minimum the cost of administering estates, ... the courts are bound to give the statute such construction and application as will fulfill the intention of Congress. In re King, D.C.W.D.Tenn., 11 F.Supp. 351, 357. Among other authorities, reference was made to the opinion of Mr. Justice Cardozo in Realty Associates Corporation v. O'Connor, 295 U.S. 295, 299, 55 S.Ct. 663, 79 L.Ed. 1446, where he declared for the unanimous court that extravagant costs of administration in winding up estates in bankruptcy have been denounced as crying evils; that, in response to those complaints, Congress had attempted to fix the limit for expenses growing out of the services of referees and receivers; and that a court should not forget that Congress meant to hit the evil of extravagance, wherefore the meaning of the words of the Bankruptcy Act if doubtful, must be adapted to its aims."[4]

More recently, Bankruptcy Judge Asa S. Herzog has written as follows:

> "There is . . . one overriding principle which governs bankruptcy fees and overshadows all other can-

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4. For other statements of this court demonstrating our long-standing adherence to "the economical spirit of the Bankruptcy Act," see, e.g., *Butzel v. Webster Apartments Co.*, 112 F.2d 362, 367 (1940), and *Page v. Rogers*, 149 F. 194, 195 (1906), *rev'd on other grounds*, 211 U.S. 575 (1909).

ons. This is the economy principle, often referred to as the 'Economic Spirit of the Act' . . .

* * * * *

"Economy in administration is now axiomatic, and . . . it is sufficient to note that the Supreme Court has denounced extravagant costs of administration as a 'crying evil' and has warned against 'vicarious generosity.'

"The importance of the economy principle is that it modifies the business standards which ordinarily are the measure of fees. *Bluntly, fees in bankruptcy cases must be considerably lower than the compensation of those engaged in private practice.*" Herzog, "Fees and Allowances in Bankruptcy", 36 Conn. B.J. 374, 376-377 (1962). (Emphasis added and footnotes omitted.)

3A *Collier on Bankruptcy*, ¶ 62.12, at 1491-93, (14th ed. 1971) analyzes the elements which, in addition to the economy principle, should be used to determine the reasonable value of services rendered by counsel:

"In determining the reasonable value of services rendered by an attorney the following elements are to be considered: *'The time spent, the intricacy of the problems involved, the size of the estate, the opposition met, the results achieved,—all subject to the economical spirit of the Bankruptcy Act.'* In view of the primary purpose of bankruptcy liquidation it is not suprising to find that, aside from the principle of economy, the *results achieved* constitute the factor of greatest determinative weight.

* * * * *

This implies that (1) great success and benefit to the estate commands a liberal compensation, and (2)

all effort and labor may go virtually without reward where no benefit accrued to the estate. *Benefit to the estate* as a yardstick for measuring the value of attorneys' services has been recognized by the Supreme Court in *Randolph v. Scruggs.* [190 U.S. 533 (1903)] But even where the estate undoubtedly benefitted, for instance where the total amount of claims was reduced thanks to counsel's efforts, there may be at least two reasons for reducing his compensation as earned by the benefit conferred. One is the estate's financial inability to carry the burden of an adequate remuneration. The other, again an offshoot of the everpresent economy doctrine, may be the fact that counsel for trustee or receiver in performing certain services, for instance contesting claims against the estate, acted not only on behalf of the estate, but also on behalf of creditors, individual or groups." (footnotes omitted)

The United States District Court for the Northern District of Ohio has codified the factors to be considered in determining counsel's compensation in its Bankruptcy Rule 12(c), which provides as follows:

"Among the factors to be taken into consideration in determining the compensation to be allowed to attorneys entitled thereto by law are the following:

(1) The amount of work done.

(2) The difficulties or intricacies of the problem presented.

(3) The skill required and experience of counsel in similar cases.

(4) The results accomplished.

(5) The amount involved in connection with the services rendered.

(6) The size of the estate.

(7) The length of time consumed.

(8) Contingency or certainty of compensation."[5]

Finally, we state the standard of review which we apply in considering orders of the Bankruptcy Court which have been confirmed subsequently by the District Court. This court has held consistently that the findings of fact by a Bankruptcy Judge will not be reversed unless they are clearly erroneous. *In re Nelson & Sons, Inc.*, 426 F.2d 235 (6th Cir. 1970); Rule 52(a), Fed. R. Civ. P. In *In re Nelson*, the District Judge filed an extensive opinion and order in which he detailed his reasons for confirming the findings of the referee, and we cited approvingly *Cunningham v. Elco Distributors*, 189 F.2d 87 (6th Cir. 1951), wherein we said:

> "No principle has been more firmly established in this circuit than that concurrent findings of the referee in bankruptcy and the district judge are not to be set aside, except upon clear demonstration of mistake." 189 F.2d at 88-89.

In the present case, the District Judge incorporated the opinion of the Bankruptcy Judge and confirmed the Bankruptcy Judge's allowance of fees.

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5. Subsequent to the Bankruptcy Judge's fee allowance in this case, the local Bankruptcy Rules of the Northern District of Ohio were reformulated, and the factors to be considered in determining counsel's compensation were set forth in new Rule 8. This new rule, which went into effect on January 15, 1973, added two additional factors: 1) the expeditious performance of legal services, and 2) the professional quality of services rendered.

III. Fundamental Error of Bankruptcy Court

The basic mistake of the Bankruptcy Court involves an issue of law and procedure. The fundamental error of the Bankruptcy Judge grew out of his mistaken conception that, even though the same party is both debtor and debtor-in-possession, separate counsel must be appointed to represent the debtor-in-possession in all cases.

The Bankruptcy Judge expresses this concept in his opinion as follows:

> "Since, in the opinion of this Court, there is always a possibility, however remote, of conflict of interest between the separate entities of debtor and debtor-in-possession, this Court has always appointed, upon proper application, separate counsel from that of the debtor. The possibility of conflict is thereby removed to the satisfaction and peace of mind of both entities, the creditors, the public and the Court. The economical spirit of the Bankruptcy Act is also preserved because when one attorney wears two hats by serving two masters, in addition to the possibility of conflict, his fees are based upon the performance of two separate functions."

Appellants assert that the practice of appointing and compensating separate attorneys for the debtor-in-possession and also compensating the privately-retained attorneys for the debtor is unique to the Northern District of Ohio. This Court is aware of the distinction between the duties of counsel for the debtor and counsel for a debtor-in-possession, as discussed more fully below, but we disagree with the practice in the Northern District of Ohio. Bankruptcy Judges in other Circuits and Districts also reject this practice.

For example, Bankruptcy Judge Asa S. Herzog of the Southern District of New York finds "absolutely nothing" to support the practice employed in the Northern District of Ohio, saying:

> "A debtor is defined as a person who could become a bankrupt under § 4 of the Act and who files a petition for an arrangement. Where there is no receiver or trustee, the debtor 'shall' continue in possession of his property and 'shall' have the title and exercise the powers of a bankruptcy trustee. Thus, unless there is a receiver or trustee, the debtor automatically becomes a debtor in possession. The debtor and debtor in possession are treated as separate and distinct entities.
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> * * * * *
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> "But the debtor does not cease to exist as such when he files his petition for arrangement and spontaneously becomes a debtor in possession. The two entities exist side by side until the conclusion of the proceeding. The debtor in possession may be authorized to operate the business and manage the property of the debtor (§ 343), and may be authorized to borrow money, etc. and issue certificates of indebtedness therefor (§ 344), or to lease or sell property of the debtor [§ 313(2)]; but it is the debtor who proposes the arrangement (§ 323), is examined at the meeting of creditors [§ 336(3)], and makes the deposit necessary to effect the arrangement [§ 337(2); § 362(2)].
>
> "Thus the attorney retained to file the petition usually acts in two capacities, concurrently representing the debtor in effecting an arrangement and the debtor in possession in the exercise of the powers of a bankruptcy trustee and in all things in connection with the conduct of the business.

"I do not think it was intended that the debtor be represented by one attorney and that in his capacity as debtor in possession, he must be represented by an entirely different attorney. There is absolutely nothing to support such a view. The fact remains, as I have indicated, that the debtor in possession is not a trustee. He may possess the title and powers of a trustee and his position may be 'for all practical purposes' that of a trustee; he may be a 'court officer analogous' to a trustee; but he is not the independent trustee appointed pursuant to § 44 of the Act. *I cannot conceive of the debtor so dimidiated that he requires different counsel each time he changes hats!*

* * * * *

"As a matter of common practice, the attorney representing the debtor and the debtor in possession files a single application reciting all the professional services rendered by him in both capacities."

Herzog, "Bankruptcy Law—Modern Trends". 37 Ref. J. 110-12 (1963). (Emphasis added and footnotes omitted.)

Bankruptcy Judge William Rudin of the Eastern District of New York, states that "I fix one fee to cover all the services rendered" by the attorney for the debtor and the attorney for the debtor-in-possession. Although there is a statutory distinction between the person designated as attorney for the debtor and the attorney for the debtor-in-possession, Judge Rudin says, "[H]e is, of course, one and the same person. . ." Rudin, "Allowance in Chapter XI Proceedings," 40 *Ref.J.* 29, 30 (1966).

This court strongly disapproves the practice of appointing separate counsel as attorney for the debtor-in-possession and at the same time compensating another

attorney at the expense of the bankrupt estate in his capacity as counsel for the debtor for services rendered after the filing of a petition for a plan of arrangement. Hereafter we will not approve this procedure as a general practice in the Sixth Circuit. Only in exceptional circumstances, which we do not now foresee, will this procedure be allowed by this court. The debtor and the debtor-in-possession is one and the same person, although "wearing two hats." We see no valid reason why, as a general rule, his legal representation in both capacities should not be limited to one attorney or one set of attorneys. In the ordinary situation, as in the instant case, there is no actual or potential conflict of interest requiring or justifying payment for services of separate attorneys.

In the present case, however, we are confronted by a situation where an able and experienced Bankruptcy Judge has followed this practice in accordance with previously established precedent in his District at a time when there was no precedent to the contrary in this Circuit. Two sets of attorneys have devoted considerable time and effort in this Chapter XI proceeding which resulted in the confirmation of a Plan of Arrangement continuing the economic life of Cle-Ware and its subsidiaries. The Bankruptcy Judge avoided the considerable expenses of a receivership, yet kept the debtor corporations functioning as a continuing enterprise.

Appellants contend that no fee should be allowed to counsel for the debtor. This appears to be a question of first impression in this Circuit and we apply today's rule only prospectively. We are unwilling to make this rule applicable in the present case of the obvious inequities that would result.

Instead we reverse the decision of the District Court and remand with directions to fix a reasonable fee in this particular case for counsel for the debtor and a reasonable fee for counsel for the debtor-in-possession, the total of which shall not exceed a reasonable fee which would be allowable to one attorney, representing the debtor corporations in their capacities as both debtor and the debtor-in-possession.

On remand, we direct that an evidentiary hearing be conducted on the objections of the debtor corporations, that counsel be required to substantiate their fee requests under the guidelines set forth in this opinion, and that the objecting parties be afforded the right of cross examination of the claimant attorneys.

The procedure to be followed on remand with regard to the respective fees in this particular case is set forth more fully in Sections V and VI of this opinion.

IV. General Order 44

Appellants further contend that no fee can be allowed to the attorneys for the debtor because they were not appointed by the Bankruptcy Court pursuant to General Order 44.[6]

General Order 44 provides that "no attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court." This provision does not on its face cover an attorney for a debtor who is

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6. For a complete text of General Order 44, see n. 3. The litigants stipulate that General Order 44 is applicable to this case although the United States Supreme Court abrogated the General Order effective October 1, 1973, when it implemented its new Rules of Bankruptcy Procedure. A compilation of the new bankruptcy rules relevant to the issues raised in this case is contained in an appendix to this opinion.

not in possession. 8 *Collier on Bankruptcy* ¶ 5.34, at 716 (14th ed. 1971) states as follows:

> "General Order 44 does not apply to an attorney for a debtor not in possession, or to an attorney for a bankrupt prior to the filing of a Chapter XI petition under § 321 in a pending bankruptcy proceeding."

In support of their contention with respect to General Order 44, appellants rely primarily on *In re Hydrocarbon Chemicals Inc.*, 411 F.2d 203 (3rd Cir. in banc), *cert. denied* 396 U.S 823 (1969). We find that decision to be factually distinguishable and not controlling in the case at bar.

In *In re Hydrocarbon Chemicals*, the matter was originally a Chapter XI proceeding and subsequently was converted to a Chapter X proceeding. While in Chapter XI, the Bankruptcy Court appointed a receiver who retained two sets of attorneys on order of the court. Thereafter, the fee claimants—attorneys who were retained by the debtor's attorney without court approval—settled claims of creditors and removed the Government's jeopardy tax assessment. A majority of the judges of the Third Circuit determined that such services "were clearly among the duties of the receiver which should have been performed by him and his attorneys." 411 F.2d at 206.

V. The Fee of Counsel for the Debtor

The Bankruptcy Judge allowed the attorneys for the debtor, Frank C. Whalen and the law firm of Kohrman and Jackson, a compensation award of $162,500. In addition to the grounds referred to above, the appellants object to the fee allowance for these attorneys on the following grounds: 1) Some of the compensated services were performed not for the debtor but for its principal shareholder, Gerald Levine; 2) These attorneys performed ministerial

and administrative services not properly compensable as professional services; 3) These attorneys duplicated services performed by the attorneys for the debtor-in-possession; and 4) The compensation award to these attorneys was clearly excessive.[7]

The legal services alleged to have been performed for the personal benefit of Gerald Levine constitute one of the most troublesome issues raised on this appeal. Gerald Levine was the principal stockholder of Cle-Ware, owning 165,992 out of 394,000 shares issued as of October 13, 1971. On that date he entered into an agreement with several persons known collectively as the 1300 Group whereby Levine sold his stock and transferred his voting rights. The contract provided for the sale of Levine's stock at $10 per share for a total of $1,659,920 and a collateral agreement for the employment of Levine by Cle-Ware under its new management. Repayment of Levine's debt to Cle-Ware of $40,000 was delayed over a five year period. Levine reaped these benefits from the transaction while unsecured creditors with claims exceeding $15 million were paid only five cents on the dollar in cash under the terms of the Plan of Arrangement. So far this record discloses, Levine received all these benefits without assuming personal liability for any attorney's fees.

Appellants assert that these attorneys were compensated for 573 1/3 hours spent on the negotiation and sale of Levine's Cle-Ware stock to the 1300 Group. Beginning in April 1971, these attorneys met occasionally with the members of the 1300 Group to negotiate what became the ultimate agreement with the group. There-

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7. The appellants also raise the last three objections to the fee allowance to counsel for the debtor-in-possession. The principles stated in this section with respect to these objections are equally applicable in the forthcoming section dealing with the fee of counsel for the debtor-in-possession.

after, there were frequent conferences among these attorneys, members of the group and Levine.

It is undisputed that the debtor corporations were not parties to the Levine-1300 Group agreement and that Levine was represented by the same counsel who here seek compensation as attorneys for the debtor. Further, the record reveals that *all* the time devoted by counsel to fashioning this agreement was included in their application for allowance as attorneys for the debtor.

It is clear that attorneys entitled to fees for services in bankruptcy and Chapter XI proceedings will have their fees reduced proportionately where their services were partly performed on behalf of private clients. 3A *Collier on Bankruptcy* ¶ 62.12, at 1493 (14th ed. 1971) states:

> "While an attorney's association with other parties in interest does not necessarily prevent his appointment as counsel for the estate, yet it may cause him to suffer a reduction of his compensation out of the estate on the ground that certain services are considered to have been rendered for the benefit of his private clients rather than for the estate."

Further, *Collier* adds:

> "Where there is such a multiplicity of beneficiaries of one particular service, courts are anxious to see in the estate only a kind of secondary beneficiary of efforts made primarily for, and therefore to be compensated by, the directly interested creditors." (footnote omitted.) *id.*

Similarly, the record in this case indicates that a major portion, if not all, of the disputed 573 1/3 hours represents time spent by these attorneys rendering legal services for Levine and not for the debtor. On remand, these

disputed items should be reviewed item-by-item before a determination is made as to which, if any, are properly chargeable to the debtor. No compensation should be allowed for any services found to have been rendered to Levine as an individual.

The appellants' second objection to the compensation award to the attorneys for the debtor is that the award represents compensation for ministerial and administrative services not properly compensable as professional services within the meaning of General Order 42. General Order 42 provides as follows: "No allowance of compensation shall be made to any attorney for a receiver, trustee or debtor in possession except for professional services."[8]

The standards of professional services are set forth in 3A *Collier on Bankruptcy* ¶ 62.12, at 1481-82 (14th ed. 1971):

> "The services for which an attorney for a receiver or trustee may claim compensation are scarcely more susceptable of exhaustive definition than are the administrative duties of his client. Only *professional* services, it is true, are entitled to compensation, and General Order 42 is clear enough not to leave any room for a charge for non-professional services, such as services of a commercial or clerical nature, or as accountant, even if this charge be made at a rate which in no wise differs from the rate the officer would have to pay if the services were rendered by a non-lawyer. However, within the scope of the term 'professional services' the conceivable variety of legal

8. Although General Order 42 was abrogated by the Supreme Court effective October 1, 1973, it is nevertheless applicable to this case, the facts of which transpired in 1971 and in which fees were allowed in 1972. For the text of the relevant Rule of Bankruptcy Procedure which has superseded General Order 42, see the appendix.

services is co-extensive with the activities of the officer himself . . . The allowance of compensation for such services may be said to be governed by one leading test: wherever the officer (trustee or receiver) is by the statute either *directed* or in his sound discretion *permitted* to act, and where the compliance with his duties or the exercise of his privileges require legal advice or assistance, the estate is chargeable with a reasonable allowance of the officer's attorney, if retained by leave of court, in respect of all services reasonably warranted by the circumstances of the case." (footnotes omitted)

Judge Learned Hand observed in *In re Eureka Upholstering Co.*, 48 F.2d 95, 96 (2d Cir. 1931):

> "In conclusion, we cannot ignore the curious notion which this application discloses, that an attorney may recover for what are not legal services at all. For example, in the petition at bar are items for arranging for the sale of the assets, hiring truckmen to carry back concealed property to the bankrupt's place of business, safeguarding the property, going along with the truck, checking up what was found, stirring up a criminal prosecution, getting hold of an accountant, collecting accounts due, inquiring of a pledgee of accounts as to any equity, examining the bankrupt's papers, and more of the sort. The implication behind these claims is that the receiver's attorney may recover, as for legal services, for discharging the duties of the receiver himself. This is an error, ..."

This objection primarily is applicable to Exhibit B of the application of the attorneys for the debtor-in-possession, *infra*. The appellants assert that the following activities of counsel for the debtor are not compensable as professional services: 1) customer relations and investiga-

tion; 2) meetings wth employees of subsidiaries; 3) continued representation of the debtor as corporate counsel; 4) furnishing information and documents to the Securities and Exchange Commission; and 5) work with a public relations specialist.

We emphasize that counsel for the debtor are not entitled to be compensated for any services outside the scope of the customary duties of counsel for the debtor as detailed at the end of this Section V. When the Bankruptcy Court approved counsel for the debtor-in-possession, those attorneys, and not the attorneys for the debtor, became the only attorneys who could be compensated for rendering legal services for the operation of the bankrupt estate. On the record before us, this court cannot determine on this appeal whether any or all of the five activities enumerated above should be classified as professional services. This issue is to be determined on remand. We observe, however, that all of the five enumerated above, even if classified as professional services, appear to involve services in the administration of the bankrupt estate. As such, they are not compensable to counsel for the debtor.

On remand, the District Court should review each of the items for which these attorneys request compensation to determine whether (1) they constitute professional services, and (2) if so, which counsel should be compensated for such services as falling within the scope of their respective duties. The compensation of attorneys for the debtor should be limited to legal services which it is the duty of the attorneys for the debtor to provide. In no event should compensation be allowed to any attorney for services other than professional services.

The appellants' third objection to the compensation award to the attorneys for the debtor is that the award represents compensation for duplicated services. The ap-

pellants contend that the total award was bound to skyrocket once the Bankruptcy Court permitted allowance of compensation to separate sets of attorneys for the debtor and the debtor-in-possession. Appellants cite several cases wherein courts reduced fees where it was found that separate sets of attorneys performing overlapping services burdened the estate. *See, e.g., Official Creditors' Committee of Fox Market, Inc. v. Ely*, 337 F.2d 461 (9th Cir. 1964); *In re Solar Mfg. Corp.*, 215 F.2d 555 (3rd Cir. 1954).

With respect to the employment of several attorneys which results in duplication of services, 3A *Collier on Bankruptcy* ¶ 62.12, at 1506 (14th ed. 1971) states:

> "Only *one* reasonable attorney's fee is provided for, irrespective of the number of attorneys employed. There is no such statutory protection against duplication or multiplication of legal services rendered to the trustee or receiver. In this respect, however, the courts have reached results in harmony with the statutory principle. They have not only denounced duplication of services generally, applying as a sanction the denial of compensation, but they decided to allow in much the same way *one* attorney's fee only, wherever several attorneys rendered the estate services that could have been rendered by a single attorney." (footnote omitted)

Counsel for the debtor and counsel for the debtor-in-possession cannot be compensated for rendering the same service. In the item-by-item review on remand of the applications submitted by both sets of attorneys, fees to debtor's counsel should be limited to those legal services which they provided and which are within the scope of their duties. Similarly, the District Court should allow fees to counsel for the debtor-in-possession for those legal

services which they provided and which are within the scope of their duties.

The appellants' final objection to the compensation award to the attorneys for the debtor is that the Bankruptcy Judge abused his discretion in allowing $162,500 in fees since this amount was clearly excessive and inconsistent with the economical spirit of the Bankruptcy Act. In support of this objection, the appellants assert that counsel for the debtor requested compensation at an hourly rate of about $71[9] (2,517 hours for a requested $180,000). Further, these rates are alleged to be substantially higher than the prevailing rate recommended by the local bar association.

Although the Bankrutcy Judge noted the factors to be taken into consideration in determining the reasonableness of a fee stated in local Bankruptcy Rule 12(c) and referred to a relevant disciplinary rule of the local bar association, he apparently accepted the proffered hourly rate without receiving evidence on what it should be. The Bankruptcy Judge attributed "the incomparable skill and expertise of these learned scholars and able practitioners [counsel for the debtor]" as being the primary factor in resuscitating Cle-Ware. The "masterful job" of these attorneys resulted in general creditors receiving five cents on the dollar with a stock option or the possibility of fifteen to twenty cents on the dollar for those who elected to take deferred payments.

Assuming, without deciding, that this was a "masterful job," the Bankruptcy Judge clearly erred in making the compensation award without "opinion evidence touching the reasonableness of the fee." See *In re Barceloux*, 74

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9. Counsel for the debtor-in-possession requested compensation at an hourly rate of $50, *infra*.

F.2d 288, 294 (9th Cir. 1935). At the hearing to be conducted on remand, opportunity should be provided the litigants to introduce such opinion evidence.

Consistent with the above reasoning, we find it difficult to conceive any situation which would justify awarding these attorneys compensation in excess of the hourly rate recommended by the local bar association for such bankruptcy work, however "masterful" the job. Attorneys who take bankruptcy work do so with advance knowledge that they cannot expect the highest of fees, especially in cases such as this, where the general creditors are paid only five cents on the dollar in cash and face the prospect of receiving no more than twenty cents on the dollar.

We reemphasize that the attorneys for the debtor can be compensated only for those services normally performed by an attorney serving in that capacity. These include the following: the preparation and filing of the schedules and statement of affairs, the petition for arrangement and all other applications and orders which were required except those relating to the operation of the business; appearances on behalf of the debtor in court proceedings; attendance at meetings of creditors to consider the proposed arrangement; preparation of the application and order for confirmation and attendance at hearings thereon; offering of the required proof of the "feasibility" of the arrangement and that it was in the best interests of creditors; and representation of the debtor in other hearings involving the adoption of the arrangement.[10]

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10. For further discussion of the customary duties of counsel for the debtor, see Rudin, "Allowances in Chapter XI Proceedings," 40 *Ref. J.* 29 (1966) and 8 *Collier on Bankruptcy* ¶ 6.25, at 945-48, (14th ed. 1971).

Accordingly, we reverse the order of the District Court affirming the compensation award to counsel for the debtor, Whalen and the firm of Kohrman and Jackson, and remand for a hearing on the objections raised by the appellants and for determination of a reasonable fee consistent with the principles herein stated.

VI. Fee of Counsel for the Debtor-in-Possession

The court appointed attorneys for the debtor-in-possession, Sokolsky and Friedlander, were granted a compensation award of $197,500 by the Bankruptcy Judge.

The attorneys for the debtor-in-possession based their fee application on two exhibits. Exhibit A set forth a chronology of work performed showing the time in most cases attributed to each task. Compensation was calculated at the rate of $50 per hour, and the fees claimed by counsel based on Exhibit A services aggregated $102,669. Exhibit B detailed a listing of 8,842 entries contained in 2,487 applications presented to the Bankruptcy Court for approval and authorization of checks to be issued by the debtor-in-possession.[11] The expenditure applications granted by the Bankruptcy Court during this period totaled $10,762,176.40. The fee claimed by these attorneys based on the services represented by Exhibit B aggregated $97,301.

The appellants raised numerous objections to the fee application of these counsel and requested that an evidentiary hearing be held on these objections. The Bankruptcy Court rejected the objections and failed to grant

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11. This was the procedure which implemented the Bankruptcy Court's request that every expenditure of the bankrupt could be made only upon application to and order of the Bankruptcy Court.

an evidentiary hearing prior to allowing these attorneys a fee of $197,500.[12]

The appellants allege that the Bankruptcy Judge erred for the following reasons: 1) The attorneys for the debtor-in-possession failed to document their fee application with time records for a major portion of their services, 2) The attorneys for the debtor-in-possession performed ministerial and administrative services not properly compensable as professional services, 3) The attorneys for the debtor-in-possession duplicated services already performed by the attorneys for the debtor, and 4) The compensation award to the attorneys for the debtor-in-possession was clearly excessive.

With respect to the first assignment of error, the record indicates that these attorneys failed to document with time records over one-quarter of their claims represented by Exhibit A and all of their claims represented by Exhibit B. Section 62(d) of the Bankruptcy Act, in relevant part, requires:

> "A receiver or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this title or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested, and what allowances, if any, have theretofore been made to him." 11 U.S.C. § 102(d).

This statutory provision was implemented by Rule 12(a) of the Bankruptcy Rules of the District Court which, in pertinent part, provides:

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12. This award represented $102,699 for services represented in Exhibit A and $94,801 for services represented in Exhibit B.

> "A detailed statement shall be attached to each application for attorney's fees, *showing the items of service rendered, with the charge and date for each item,* unless in any given case the Court finds that such itemization is not practicable and directs that it may be dispensed with . . ." (emphasis supplied)

The Bankruptcy Court never found that the keeping of time records was not practicable and never excused the keeping of such records, nor did the Bankruptcy Judge say why he considered the records not kept by counsel more "unreasonable and extraordinarily costly" than the time records they did keep.

The importance of the statutory requirement and the local rule are underlined by 3A *Collier on Bankruptcy* ¶ 62.33, at 1641-42 (14th ed. 1971) wherein counsel is advised to consider the following admonition:

> "Appointees of the court, whether receiver, trustee, or attorney, must expect their claims to be closely scrutinized by the debtor, the creditors, and by the court, and they should be meticulous in keeping accurate accounts of the various items and elements which go to making up their claim. It will not do to state in a general way services performed, and then ask a bulk allowance." *In re National Accessories, Inc.*, 13 F. Supp. 278, 281 (D.C. Neb. 1936).

Many decisions recognize that the keeping of accurate time records by attorneys in bankruptcy proceedings is indispensable. For example, *see, In re Roustabout Company,* 386 F.2d 354 (9th Cir. 1967); *Miller v. Robinson,* 378 F.2d 2, 3 (9th Cir. 1967); *In re General Economics Corporation,* 360 F.2d 762, 765 (2d Cir. 1966); *In re Hudson & Manhattan Railroad Co.,* 339 F.2d 114, 115 (2d Cir. 1964).

Chief Judge Lumbard said in *Hudson & Manhattan Railroad*:

> "We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required. There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so." 339 F.2d at 115.

Without the time records to document all the services represented by Exhibit A and with no inkling of an idea of how much time counsel spent on legal services represented by Exhibit B, we find it impossible to determine if the compensation award to the attorneys for the debtor-in-possession was reasonable. Absent this evidence, the Bankruptcy Judge clearly erred in rendering a compensation award of $197,500.

At the evidentiary hearing on remand the Bankruptcy Court should require counsel for the debtor-in-possession to establish the amount of time actually spent by them on the items listed in Exhibit A for which there are no time records and the role of counsel in preparing and submitting the Exhibit B applications to the court for approval of expenditures by the bankrupt.

The appellants' second assignment of error with respect to the compensation award to the attorneys for the debtor-in-possession is that the award represents compensation for ministerial and administrative services not prop-

erly compensable as professional services within the meaning of General Order 42, *supra*.

The Bankruptcy Judge found that the services for which these attorneys were compensated were in strict conformity with the standards of General Order 42. The Bankruptcy Judge emphasized that it was he who had placed the onerous burden on these counsel of devoting "their legal talents and consummate skills to overseeing the entire management of the business in order to protect the assets and prevent losses."

In response, the appellants contend that none of the services attributable to Exhibit B, except the initial fashioning of the procedure to request a court order for each expenditure, are professional services. The litigants dispute who actually prepared and submitted these requests for court orders approving expenditures. The appellants contend that it was the managerial personnel of the debtor-in-possession who prepared and submitted the requests. This is not clear from the record before us and must be determined on remand. We reemphasize that the attorneys can be compensated only for professional services and obviously they cannot be paid for documents which could have been prepared by Cle-Ware clerical personnel.

Absent some determination of the role actually played by counsel in getting each Cle-Ware expenditure approved, we think it impossible to set a fee for the type of services represented in Exhibit B. At the same time, it must be acknowledged that the Bankruptcy Judge, who did not appoint a receiver in this case, placed a heavier than usual burden on counsel in requiring counsel to oversee the entire management of the bankrupt. However, we find nothing in the Bankruptcy Act that permits attorneys to be compensated for services ordinarily performed by receivers even if it is alleged to have saved the bankrupt

estate some money. Counsel for the debtor-in-possession are experienced bankruptcy attorneys and must be charged with full knowledge of the strict requirement of General Order 42 that attorneys be compensated only for professional services. Neither the Bankruptcy Court nor this court can abrogate General Order 42.

On remand, in determining a reasonable fee to be allowed these attorneys, each Exhibit A item should be reviewed to determine whether it constituted professional services under General Order 42. Counsel for the debtor-in-possession should be compensated only for those activities which were professional *legal* services.

The appellants' third assignment of error with respect to the compensation award to the attorneys for the debtor-in-possession is that the award represents compensation for duplicated services. In the previous Section V of this opinion, we have determined that two sets of attorneys should not be compensated for overlapping services and that the test which should be employed on remand in determining which set was entitled to compensation for a particular service is as follows: Within the scope of which particular set of attorneys' duties should the service have been rendered?

The appellants' final assignment of error with respect to the compensation award to the attorneys for the debtor-in-possession is that the Bankruptcy Judge abused his discretion in allowing $197,500 in fees. In support of this contention, the appellants assert that the hourly rate of $50 applied to Exhibit A claims was higher than the prevailing rate recommended by the local bar association.

For the reasons hereinbefore stated, on remand the litigants should be permitted to introduce "opinion evi-

dence touching the reasonableness of the fee" prior to the allowance of any fee to these attorneys.

Compensation of the attorneys for the debtor-in-possession should be allowed only for legal services customarily performed by attorneys serving in that capacity. These are limited to legal services to the debtor-in-possession in connection with the operation of the business.[13] Once the petition for a plan of arrangement had been filed, the property was in the custody of the debtor-in-possession. The attorneys for the debtor-in-possession are entitled to be compensated only for those legal services performed by them in connection with the operation of the business.

Accordingly, we reverse the order of the District Court affirming the compensation award to counsel for the debtor-in-possession, and remand for a hearing on the objections raised by the appellants and for determination of a reasonable fee consistent with the principles herein stated.

VII. Conclusion

In *Gochenour v. Cleveland Terminals Bldg. Co.*, 142 F.2d 991, 995 (6th Cir. 1944), this court emphasized that compensation is allowable only with respect to "matters in connection with the reorganization of the debtor and proceedings on behalf of creditors and stockholders. [The Act] comprehends matters directly affecting the plan of reorganization and excludes those indirectly affecting them. . . . It is the duty of the court in administering the bankruptcy law to avoid double expense to the estate. . . ."

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13. For further discussion of the customary duties of counsel for the debtor-in-possession, see Rudin, "Allowances in Chapter XI Proceedings," 40 *Ref. J.* 29, 30 (1966) and 8 *Collier on Bankruptcy* ¶ 6.32, at 960-983 (14th ed. 1971).

In order to avoid the double expense of attorneys' fees for bankrupt estates in this Circuit, we today announce the general rule that hereafter we will not approve the practice of appointing and compensating separate counsel for the debtor-in-possession and at the same time compensating the debtor's privately-retained counsel for legal services rendered after the filing of a petition for a plan of arrangement. We see no valid reason, except in exceptional circumstances which we do not now foresee, why legal representation in both capacities should not be limited to one attorney or one set of attorneys.

Application of this new rule to the attorneys in this case obviously would be unjust. Therefore, the rule will be applied only prospectively. A determination must be made of the fees which should be allowed to the attorneys in the present case. In Sections V and VI of this opinion, we have set forth guidelines which in summary indicate that these particular attorneys are to be reasonably compensated for the unduplicated, professional legal services which they rendered for their respective corporate clients within the scope of their respective customary duties.

It is reemphasized that the combined fees to be allowed to the attorneys for the debtor and the attorneys for the debtor-in-possession in no event shall exceed the amount of a reasonable fee which would be allowable to one attorney representing Cle-Ware and its subsidiaries in both capacities.

The fee allowed to the respective attorneys will be supported by findings of fact after an evidentiary hearing as hereinabove provided.

Reversed and remanded.

APPENDIX

The Supreme Court of the United States in an order dated April 24, 1973, prescribed Rules of Bankruptcy Procedure pursuant to 28 U.S.C. § 2075.

The Bankruptcy Rules took effect on October 1, 1973, and were made applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies. The Bankruptcy Court and District Court proceedings in the present case were completed in 1972 and, hence, the former procedure governs disposition of this case.

The new Bankruptcy Rules abrogated most of the General Orders in Bankruptcy, including General Orders 42 and 44 which are especially applicable in the present case.

Bankruptcy Rule 215, which superseded General Order 44, is as follows:

Rule 215.

EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

(a) *Conditions of Employment of Attorneys and Accountants.* No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connec-

tions with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

(b) *Employment of Attorney or Accountant with Adverse Interest.* If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or acccountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make diligent inquiry into the connections of such attorney or accountant.

(c) *Employment by a General Creditor.* An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(d) *Employment of Attorney or Accountant on Salary.* A trustee or receiver authorized to operate

the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(e) *Employment of Trustee or Receiver as Attorney or Accountant.* The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(f) *Services Rendered by Member or Associate of Firm of Attorneys or Accountants.* If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

Bankruptcy Rule 219 was derived from portions of the Bankruptcy Act and several General Orders, including General Order 42. Bankruptcy Rule 219, in relevant part, is as follows:

Rule 219.

COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES INCURRED IN A BANKRUPTCY CASE

(a) *Application for Compensation or Reimbursement.* A person seeking compensation for services,

or reimbursement of necessary expenses, from estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred, (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

* * * * *

(c) *Factors in Allowing Compensation.*

* * * * *

(3) *Attorney or Accountant.* Compensation may be allowed an attorney or an accountant only for professional services.

JUDGMENT OF THE COURT OF APPEALS

(Filed February 26, 1974)

No. 73-1063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the Matter of:

CLE-WARE INDUSTRIES, INC., *et al.*, *Debtors*

CLE-WARE INDUSTRIES, INC., *et al.*,
Appellants,

vs.

HOWARD L. SOKOLSKY, JEROME FRIEDLANDER, RICHARD PHILLIPS, FRANK C. WHALEN, KOHRMAN AND JACKSON,
Appellees.

Before: PHILLIPS, Chief Judge, CECIL, Senior Circuit Judge, and ALLEN, District Judge.

APPEAL from the United States District Court for the Northern District of Ohio.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause and the same is hereby reversed and the case is remanded.

It is further ordered that Appellants recover from Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court.

/s/ JAMES A. HIGGINS
Clerk

JUDGMENT OF THE DISTRICT COURT AFFIRMING THE JUDGMENT AND FINDING OF THE BANKRUPTCY JUDGE

(Filed November 20, 1972)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

This court has received the briefs submitted by counsel and the lengthy opinion of Bankruptcy Judge O'Neill. His opinion is clearly correct. His opinion is incorporated herein and is affirmed. Each and every specification of error raised by the debtor is rejected.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

JUDGMENT AND OPINION OF BANKRUPTCY JUDGE

(Dated July 17, 1972)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings Under Chapter XI
Case No. B 71-829

In the Matter of: CLE-WARE INDUSTRIES, INC., *Debtor.*

ALLOWANCE OF FEES AND SECOND ORDER OF DISTRIBUTION

This matter came on for hearing before the Court on the separate applications for allowance of fees filed by attorneys for the debtor corporation and the debtor-in-possession for legal services rendered in the administration of this case filed under Chapter XI of the Bankruptcy Act.

After due notice, a hearing was conducted with the applicants, the officers of the debtor corporation and the parties who deposited the necessary funds for this successful arrangement proceedings, the latter being represented by Attorney Mark S. Lieberman of Chicago, Illinois. Since no objections were raised to several other applications considered by the Court, an allowance was made and a first order of distribution entered on March 14, 1972.

To the applications by counsel for the debtor and debtor-in-possession, however, Mr. Lieberman presented

written objections at the hearing. Although the Court had no prior notice of objections, it heard oral arguments by the objector, Mr. Lieberman, and responses of the applicants. Counsel were also permitted to subsequently file briefs, answers and replies in which numerous cases were cited, all of which have been read by this Court.

It is important to note at the outset that the money for these fees is presently on deposit pursuant to Section 361 of the Bankruptcy Act, and the funds are available for immediate disbursement. These requests for allowances were presented to the depositor prior to confirmation of the plan of arrangement on October 13, 1971, to permit his posting the necessary funds to implement the plan, and no objections were raised at that time. Although the interests of creditors are not affected by these allowances nor would Mr. Lieberman's efforts in any way benefit creditors, the Court, nevertheless, at all times maintains diligent surveillance to insure the prevention of "excessive or exorbitant fees". *Collier on Bankruptcy, Volume 8,* page 722 (4). The financial strength of the debtor, however, is also foremost in the Court's mind to be certain the debtor emerges in a healthy condition.

It further warrants mentioning that this Court prefers the appointment of a receiver in cases of this nature, but the cost herein would have been so extremely inordinate that none was appointed. For this reason and the expert knowledge required to operate this vast complex in a highly specialized field, the debtor was permitted to remain in possession under the direct supervision of the Court.

Before reciting the salient features of this protracted Chapter XI proceeding, it may be helpful to set forth the applications in issue and the bases for Mr. Lieberman's objections.

I. ATTORNEYS FOR THE DEBTOR, ALAN E. BERMAN; ROBERT H. JACKSON; WELLS, MARKS & WHALEN.

REQUESTS FOR COMPENSATION: $180,000.00

Mr. Lieberman objects to this request by counsel for the debtor for the following reasons:

1. Counsel "were not retained pursuant to an order of Court as required by General Order 44".
2. "Many of the services for which compensation is required are not compensable".
3. "Services rendered prior to the filing of the voluntary petition in Chapter XI are non-compensable".
4. "Numerous services for which compensation is requested were ministerial and administrative in nature for which legal training was not required".
5. "The amount of compensation is excessive and contrary to the economical spirit of the Bankruptcy Act".
6. "Contingency is illegal and improper in evaluating the amount of compensation".

II. ATTORNEYS FOR DEBTOR-IN-POSSESSION, JEROME M. FRIEDLANDER. RICHARD L. PHILLIPS; HOWARD L. SOKOLSKY.

REQUESTS FOR COMPENSATION: $200,000.00

The following objections to this request were also lodged by Mr. Lieberman:

1. "The services for which compensation is requested duplicate services rendered by the executive and

managerial personnel . . . and, consequently, were not beneficial to the estate".

2. "Such services do not to a significant degree rise to the level of professional legal services".
3. Services attributable to Exhibit "B" are "clearly administrative and ministerial in nature and, therefore, are not entitled to be compensated at a rate which would otherwise be appropriate had they involved high professional skill".
4. Services are "non-compensable because of the absence of detailed time records and because the compensation requested is excessive".
5. Services in Exhibit "A" "duplicate those rendered by the attorneys for debtor insofar as they relate to the preparation, negotiation and consummation of the sale of stock provided for in the plan".

III. GENERAL BACKGROUND

This matter was commenced on February 18, 1971 by the filing of a voluntary petition under Chapter XI of the Bankruptcy Act by the parent, Cle-Ware Industries, Inc. This local corporation was encountering grave financial difficulties and sought rehabilitation with the assistance of the Court. Approximately one week later on February 24, 1971, similar petitions were filed by nine subsidiary corporations. For purposes of a more efficient administration, the ten corporations were consolidated, but the legal services rendered were performed for all ten debilitated entities.

Cle-Ware Industries, Inc. and subsidiaries were involved in the nationwide distribution and warehousing of automotive parts, accessories, hardware and plumbing

supplies. Facilities were being operated in Cleveland, New York, Atlanta, Puerto Rico and California while the Rayco division had 159 outlets throughout the entire United States together with a manufacturing plant in Pawtucket, Rhode Island. The enormous operation of this complex giant required the employment of hundreds of people throughout the country and produced an annual sales volume of approximately $44 million.

The exhausting and invaluable, legal services rendered by counsel in this highly successful arrangement proceedings are set forth with detailed perspicacity in their respective applications. Since considerable attention will be devoted to each application separately, suffice it to say at this juncture that the incomparable skill and expertise of these learned scholars and able practitioners was the primary factor in resuscitating Cle-Ware and subsidiaries. The hundreds of jobs saved, the payment of hundreds of thousands of dollars in wages and taxes, payment in excess of $4 million in secured debts and partial payment to the unsecured creditors whose claims approximate $20 million, is just the tip of the iceberg of the incredible accomplishments of these dedicated attorneys. In pounding out the survival of what is presently a viable enterprise, counsels' indefatigable efforts also benefited the stockholders most handsomely. It is, indeed, a tribute to the specialized talents of these highly skilled lawyers that a successful arrangement was ultimately effected. In brief, a masterful job very well done!!

IV. APPLICABLE LAW IN GENERAL

There is a plethora of material on the principles applicable to compensation of attorneys in bankruptcy matters. In *Collier on Bankruptcy*, Volume 3 A, 14th Edition, Section 62.12, page 1489, we find

"The allowance of fees to an officer's attorney depends largely upon the facts of the individual case. In view of the fact that the elements determining an allowance are multifarious and vary with each case, *decisions as to the amount of allowance as such have little, if any, value as precedents.* . . . As any other category of administrative expenses, fees for an officer's attorney are governed by 'the economical spirit of the Bankruptcy Act.' However, *'economical' is by no means synonymous with 'parsimonious'* and should not exclude a compensation that is under all the circumstances of the case fair and reasonable. To reserve as much as possible for distribution to the creditors is one postulate, but there is another, perfectly compatible with the former, *not to discourage needlessly able and competent lawyers from accepting a retainer in bankruptcy by dening them reasonable remuneration.* A misunderstood economy in this respect may lead to evils far greater than the sacrifice imposed on the individual creditor by reason of an equitable allowance for meritorious and diligent counsel. . . .

"In determining the reasonable value of services rendered by an attorney the following elements are to be considered: 'the time spent, the intricacy of the problems involved, the size of the estate, the opposition met, the results achieved,—all subject to the economical spirit of the Bankruptcy Act.' In view of the primary purpose of bankruptcy liquidation it is not surprising to find that, aside from the principle of economy, *the results achieved constitute the factor of greatest determinative weight.*

'Success is the test applied by the business world in measuring compensation. It is largely so in the courts. As a rule, professional services, however able

or prolonged, which yield no results, command no high reward.' This implies that (1) great success and benefit to the estate commands a liberal compensation, and (2) all effort and labor may go virtually without reward where no benefit accrued to the estate. *Benefit to the estate as a yardstick for measuring the value of attorneys' services has been recognized by the Supreme Court. . . .*" (cases cited) (emphasis mine)

Among others, the leading cases on the subject of attorneys fees are the oft-quoted *Matter of Owl Drug Co.*, 16 F.S. 139 (D.C. Nev. 1936), and *Jacobowitz v. Double Seven Corporation*, 378 F.2 405 (C.C.A. 9, 1967), both of which will be referred to throughout this order. From the Owl Drug case, we developed our local Bankruptcy Rule of Court 12c which has most satisfactorily guided this Court over the years and warrants setting forth in toto:

"(c) Among the factors to be taken into consideration in determining the compensation to be allowed to attorneys entitled thereto by law are the following:

1. The amount of work done.
2. The difficulties or intricacies of the problem presented.
3. The skill required and experience of counsel in similar cases.
4. The results accomplished.
5. The amount involved in connection with the services rendered.
6. The size of the estate.
7. The length of time consumed.
8. Contingency or certainty of compensation."

The introduction of the *1972 Professional Fee Guide of the Cuyahoga County Bar Association*, which is of considerable value to the practitioners and the Courts, enumerates the factors to be considered in determining fees. These elements are taken from Disciplinary Rule 2-106 of the Code of Professional Responsibility published by the American Bar Association as follows:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent."

In the *April, 1962, Volume 36, Journal of the National Association of Referees in Bankruptcy on page 56*, the learned and highly respected Honorable Asa S. Herzog of New York writes in part on allowances:

> ". . . lacking a formula, we must fall back on 'reasonableness', that is, somewhere in the area where the

fees are neither so high as to startle the judgment nor so low as to be unmindful of the dignity of the profession and forgetful of the important duty of counsel.

'But if economy is one side of the coin, then fairness is surely the other side, for the workman is worthy of his meat and skilled attorneys are entitled to the fair value of their services. While the court must keep one eye on economy, it cannot close the other to economics. *With the cost of living index spiralling up, fees generally must be revised upwards* . . . The referees and the judges, many of them out of private practice for years, should judicially notice the economic trends, *particularly in their own geographical location*. . . .

'If compensation is not geared to modern conditions competent and diligent attorneys will not be available in bankruptcy cases. Should attorneys of high standing and caliber turn away from bankruptcy as unprofitable and the practice fall into the hands of the less reputable and less competent, the creditors will foot the bill for improper, incomplete, and, perhaps, a tarnished administration. Such a result is to be avoided at all costs, and only a realistic appraisal of the value of legal services can prevent it. . .

'Complicated problems and serious opposition must be reflected in the size of the fee. For exacting labor done, weighty responsibilities assumed and great results accomplished, compensation should be dealt out with a more liberal hand than in a routine case involving no litigation and no intricate problems. . . .

'One of the more baffling elements considered by the courts is the amount of time consumed in

rendering the services for which compensation is sought. *It seems unfortunate that of recent years this factor in terms of number of hours consumed has received unwarranted emphasis. Is an attorney to be penalized because his mental agility enables him to accomplish the same results in half the time it takes his competent, but slower colleague?* If number of hours employed is to have weight, then the court must first determine whether it was necessary to spend the amount of time claimed by the applicant. The test should be time "fairly and properly" necessary to deal with the case, rather than actual time logged. . .

"The quality of the skill which the situation facing the attorney demanded and the skill employed in meeting the situation are indeed features which deserve prominence in the consideration of a reasonable fee. And it is precisely this skill which makes 'time consumed' such an unreliable factor unless both are considered together as a single component. *The sine qua non of the allowance is the benefit the bankrupt's estate and its creditors have derived from the services rendered."* (emphasis mine)

V. APPLICATION FOR ALLOWANCES, ATTORNEYS FOR DEBTOR

To corroborate their request, counsel for the debtor have filed a pellucid application consisting of ten pages of general statement, a summary sheet reflecting 2517 hours of legal services rendered from January, 1971 through November, 1971 and 60 pages explaining in detail the breakdown of the services.

For purposes of this order, it is utterly impossible to relate succinctly the onerous and yet most productive legal work performed in this case. Although the entire span of nine months is ephemeral compared to many protracted matters requiring years of administration, the com-

plexity of Cle-Ware demanded full-time employment by these attorneys and their legal staffs. There were literally thousands of pleadings, preparation and filing of difficult schedules, reviews of thousands of applications, orders and reports, constant and lengthy negotiations with the banks, other secured creditors, Creditors' Committee, probable investors and employees. In addition, there were innumerable meetings and hearings in Court, the drafting of the complicated Plan and its amendments, S.E.C. conferences and many other legal duties too numerous to mention or detail herein. Most important, however, the Plan of Arrangement continued the debtor as a viable entity which continues to supply its countless customers, the employees have been retained and the general creditors will receive 5¢ on the dollar with a stock option or the possibility of 15¢ to 20¢ on the dollar for those who elected to take deferred payments. Alternatively, an adjudication and liquidation would have been a total disaster.

Objections to this request for fees were made by Attorney Lieberman, who, incidentally, had nothing whatsoever to do with this proceeding until the hearing on applications for fees. In summary, his objections basically are that (1) counsel for the debtor were not properly retained by order of Court pursuant to General Order 44, (2) many services were non-compensable in that they were non-legal and rendered prior to the filing of the Chapter XI petition, and (3) compensation requested is illegally based on a contingency and is excessive.

1. *The Objection on Non-Compliance with General Order 44.*

Mr. Lieberman relies heavily upon his contention that counsel for the debtor were not appointed pursuant to General Order 44 which states, inter alia, that "no attorney

for a receiver, trustee or debtor-in-possession shall be appointed except upon the order of the Court. . ."

Since General Order 44 makes no mention of the attorney for the debtor, Mr. Lieberman valiantly attempts to torture its applicability to the case at bar primarily through the use of two cases; namely, *In re Hydrocarbon Chemicals, Inc.*, 411 F.2 203 (C.C.A. 3), (1969) and the 6th Circuit case of *Gochenour v. Cleveland Terminal Building Co.* reported in 142 F.2 991 in 1944. Neither of these cases, however, is illustrative.

The *Hydrocarbon* case, *supra*, was originally a Chapter XI proceeding and subsequently converted to Chapter X. While in Chapter XI the Court appointed a receiver who retained two sets of attorneys upon order of the Court. Thereafter, the claimants, attorneys, who were retained by the debtor's attorney without Court approval settled claims of creditors and removed the Government's jeopardy tax assessment. The Court rightfully held such services to be "clearly among the duties of the receiver which should have been performed by him and his attorneys".

In the *Gochenour* matter, *supra*, the claimants, attorneys, had matters pending in State Court when the Section 77 B arrangement proceeding was filed. They sought authority to prosecute certain actions and were refused. Claimants then proceeded without the Bankruptcy Court's authority to collect a chose in action and, in reality, conferred no benefit to the estate. These attorneys were rightfully held to be volunteers and entitled to no compensation.

Both cases of Hydrocarbon and Gochenour, supra, are readily distinguishable from the case at bar where counsel were retained to represent the debtor as evidenced by their having filed the petition on February 18, 1971. By

the specific language of General Order 44, it is obvious the debtor has a right to select his attorneys without Court approval or appointment.

2. *Objection to Services as Being Non-Legal and Performed Prior to Filing of Proceedings.*

(a) The fact that attorneys are compensated for services of a legal nature only is uncontroverted. Mr. Lieberman maintains, however, the services performed by counsel were ministerial and not of a legal or professional nature.

This extremely complicated and tedious corporate reorganization was filed on February 18, 1971 and confirmed on October 13, 1971 after arduous and exhaustive efforts by all counsel. Since Mr. Lieberman's first appearance was January 24, 1972, at the hearing on fees, three and one-half months after confirmation, he understandably is unaware of the demands made upon counsel by this Court, demands that at times were admittedly unreasonable. Because of the important and wide-spread operations of Cle-Ware with many critical eyes focused thereon, this Court established stringent guidelines for the attorneys. The inordinate burden was placed upon the debtor and counsel to submit daily operating statements reflecting all receipts and disbursements, again an unconscionable requirement.

Meetings were called and conducted by the Court on a moments notice to review the cash-flow position in order to justify this unwieldy operation. Innumerable progress meetings of this nature were held in the early mornings, evenings after the work day and even on Saturdays and Sundays with complete and total cooperation of counsel. In determining all services rendered by counsel to be legal and professional, reference is made to the language found in the above cited Hydorcarbon case. In his dissent, then Chief Justice Hastie of the Third Circuit

Court of Appeals, in commenting on the majority's treatment of the claimant's request for compensation as "intermeddling volunteers", states on page 209, "I disagree with this reasoning because I think it does not sufficiently take into account significant differences between an ordinary bankruptcy administered by a Court appointed trustee and a debtor proposed Chapter XI arrangement. . . ." Several excellent paragraphs follow in which Judge Hastie articulately differentiates between an ordinary bankruptcy and a Chapter XI proceeding and the responsibility placed upon the debtor and counsel in Chapter XI to bring about their "efforts to arrange his affairs that he will salvage some significant part of his estate while making acceptable provisions for his creditors. . . . Much of a debtor's activity in shaping and reshaping a plan and in removing impediments to its acceptance by creditors is lawyer's work properly intrusted to the debtor's attorney." All services performed and enumerated by counsel herein are legal and professional.

(b) To support his contention that services rendered prior to the filing of the petition are non-compensable, Mr. Lieberman again relies heavily upon the Owl Drug case, supra. This Court agrees with the holding in Owl Drug which, however, was an involuntary case filed by creditors and the services of the bankrupt's attorney actually commenced upon his being retained after the bankrupt was served a copy of the petition. The Owl case is certainly not analogous to the case at bar, however, there is merit to the Lieberman objection that services rendered prior to the Chapter XI proceeding are not wholly compensable as costs of administration. Consequently, this Court is constrained to find that the services performed by the firm of Kohrman and Jackson in January and a portion of February, 1971, are not a proper cost of administration as will be reflected in the ultimate allowance.

3. *Objection That Compensation is Illegally Based Upon Contingency and is Excessive.*

The allegation by Mr. Lieberman that counsel for the debtor have based their fees upon a contingency is, in the opinion of this Court, a spurious charge without foundation and warrants no further comment.

In his asseveration that requests for fees are excessive, Mr. Lieberman cites the case of *In re Mabson Lumber Co.*, 394 F.2 23, (C.C.A. 2), (4/26/68). Although Mabson involves liquidation in a straight bankruptcy rather than a Chapter XI proceeding, it is interesting to note the Court's thinking on page 25, ". . . that fees allowed be such as not to discourage competent counsel from active and effective participation." Mr. Lieberman further relies upon the *Matter of Roustabout Company*, 386 F.2 354, (C.C.A. 3), (9/27/67), also a straight bankruptcy liquidation and inapplicable to the case at bar.

As previously stated Mr. Lieberman, the objector, entered no appearance in this case until the hearing on applications for allowances on January 24, 1972. Even the reviewing Courts have repeatedly held that because of the trial Court's personal knowledge of the nature and magnitude of services rendered considerable latitude be given to his allowances.

In the *Gochenour* case, *supra*, on page 995 the Court states, "The trial judge is familiar with proceedings in his Court and also has expert knowledge as to the value of the legal services. He should, therefore, have a broad discretion on the subject since he has a far better means of measuring what is just and reasonable than an appellate Court."

In *Stein v. Hemker*, 157 F. 740 (C.C.A. 8), (10/24/46), we find on page 743 that "on review the Appellate

Court must give due regard to the trial Court's superior knowledge concerning the details of the reorganization proceeding and the contribution of counsel in the conservation of the debtor's estate. . ."

From a thorough analysis of the assiduous efforts of counsel for the debtor, the Court finds and concludes that (1) General Order 44 is inapplicable and counsel were properly retained, (2) the services performed were legal and professional and not contingent, (3) requests for compensation are excessive only in that a portion of the services rendered by Kohrman and Jackson prior to the filing of the petition is not a proper cost of administration and, therefore, an allowance of $162,500.00 is fair and reasonable and counsel for the debtor are awarded same.

VI. APPLICATION FOR ALLOWANCES, ATTORNEYS FOR DEBTOR-IN-POSSESSION

Mr. Lieberman's six objections to applications for allowances by counsel for the debtor-in-possession can best be summarized as claiming the services to be (1) ministerial rather than professional in nature, (2) duplicative of services by attorneys for debtor and the managerial personnel and, hence, not of a legal nature and (3) improperly recorded and excessive.

1. *The Objection That Services are Non-Professional, Duplicative and Improperly Itemized Without Time Records.*

This fee bill submitted by counsel consists of a twelve page summary and Exhibits "A" and "B". Exhibit "A" is a thorough 202 page, detailed breakdown of services rendered from February 13, 1971 through November 29, 1971; Exhibit "B" is an additional 79 page itemization of expenditures by Cle-Ware and the legal services per-

formed by counsel on these disbursements from February 25, 1971 through October 22, 1971. It is the services set forth in Exhibit "B" consisting of 8,847 entries aggregating disbursements of $10,762,176.40 to which Mr. Lieberman most vociferously objects as being non-professional, not having proper time records and a duplication of ministerial services of executive and managerial personnel.

As previously noted, when this matter was filed on February 18, 1971, the Court held numerous sessions with the debtor and counsel to establish rigid boundaries in which the debtor-in-possession was to operate the Cle-Ware empire. The Court was fully cognizant and most sensitive to the fact that since the debtor manifested his inability to successfully operate the business prior to filing, the creditors had little faith or confidence in his running the business subsequent to filing. Consequently, an additional onerous burden was placed upon counsel to devote their legal talents and consummate skills to overseeing the entire management of the business in order to protect the assets and prevent losses. To insure this end, the Court required every expenditure to be made only upon application and order of the Court. According to the fee bill, there were 2,487 applications and accompanying orders prepared, reviewed, studied and approved by counsel before being ultimately filed for Court approval. All of these legal duties were most competently performed pursuant to the application and order employing counsel which the Court signed on February 18, 1971. To require specific time records for each entry is unreasonable and extraordinarily costly.

Services rendered by counsel for the debtor-in-possession were performed ably and efficiently with the highest of legal standards and in no way were duplicative of work performed by managerial personnel or services of

other counsel. The economical aspects of administration were also observed as evidenced by the fact that if counsel had charged even $15.00 for each application and order covering the 8,847 separate disbursements, a total of 17,694 pleadings, the cost would have been staggering and far in excess of the amount requested herein.

There is no question that the services rendered were in compliance with the rules prescribed by the Court, and in awarding fees, the Court is in strict conformity with General Order 42 which states, "No allowances of compensation shall be made to any attorney for a receiver, trustee or debtor-in-possession except for professional services."

Again, the cases cited by Mr. Lieberman are Mabson and Roustabout, supra, both of which, as previously noted, involve fees for attorneys in straight bankruptcy cases and are of little assistance in the Chapter XI case at bar.

2. *Objections of Excess Costs of Administration and Requests for Compensation.*

Mr. Lieberman is also highly critical of this Court's permitting attorneys for the debtor-in-possession when the debtor has already retained counsel. This precautionary and widely accepted practice has proved to be most satisfactory in this and many other Courts. This Court has always regarded the debtor and debtor-in-possession as separate entities for reasons explained in *Collier*, Volume 8, Sections 6.25 and 6.30 on pages 938 and 949 respectively, "Careful distinction must be drawn between a debtor and debtor-in-possession. Regardless of whether or not there is a receiver or trustee, *a debtor as such possesses certain rights and privileges and is subject to certain duties.* If the debtor continues in possession of his property pursuant

to Section 342 (of the Bankruptcy Act), then *as debtor-in-possession he has separate and additional status with incidents of its own.*" (emphasis mine)

Since, in the opinion of this Court, there is always a possibility, however remote, of conflict of interest between the separate entities of debtor and debtor-in-possession, this Court has always appointed, upon proper application, separate counsel from that of the debtor. The possibility of conflict is thereby removed to the satisfaction and peace of mind of both entities, the creditors, the public and the Court. The economical spirit of the Bankruptcy Act is also preserved because when one attorney wears two hats by serving two masters, in addition to the possibility of conflict, his fees are based upon the performance of two separate functions.

Another objection by Mr. Lieberman is that too many lawyers were permitted in this case and, hence, larger fees. It is, therefore, important to emphasize that only two attorney fees are awarded in this order, one for debtor's counsel and the other to counsel for the debtor-in-possession. So long as the provisions of Section 62d of the Bankruptcy Act regarding the attorneys' applications for compensation and the accompanying affidavits are satisfied, which they are, the Court is not to concern itself with the number of partners or members in the law firms.

Mr. Lieberman further charges that counsels' request for compensation is excessive. In addition to my prior comments on the intricacies and quality of services performed, this case is notable in that the legal problems ran the gamut of the law including the nuances of bankruptcy, labor, taxes, real estate, insurance, Uniform Commercial Code, etc. A myriad of legal difficulties, which often appeared insurmountable, were encountered with

banks, unions, would be investors, secured and unsecured creditors, etc., and were ultimately untangled and solved. Only the unique knowledge and able, legal handling of counsel prevented protracted and costly lawsuits. Unquestionably, these excellent lawyers were directly responsible for the rapid and successful disposition of this laborious proceeding.

Regarding the claim of excessive fees and the subject of economy of administration, it warrants repeating that in the case at bar, the prohibitive cost of a receiver was eliminated and no accountants were employed. Although counsel have reduced their requests from $227,699.00 to the present figure of $200,000.00, the Court, however, is of the opinion that a number of the pleadings were boiler-plate in form, a fact which will be taken into consideration in the allowance.

After a sedulous perusal of the fee bill presented by counsel for the debtor-in-possession, the Court finds and concludes that the services rendered were, (1) professional and legal and neither duplicative nor ministerial, (2) properly recorded in the least expensive manner, (3) most beneficial to the estate and excessive only in that some of the pleadings were boiler-plate in form and, therefore, an allowance of $197,500.00 is fair and reasonable and is awarded to counsel for the debtor-in-possession accordingly.

"There is nothing more difficult nor embarrassing than to appraise the value of professional services," *In the Matter of Dole Company*, 244 F.S. 751, (D.C. of Me.), page 757.

In undertaking this task of allowances, therefore, it bears repeating that the guidelines of the Bar Associations, the texts and cases were given considerable thought and

followed as closely as possible. As stated, however, on page 405 of the *Jacobowitz* case, *supra*, "determination of attorney fees to be allowed in bankruptcy proceedings must be considered and determined on a case by case basis." Consequently, the amount of work performed herein, legal intricacies of the problems encountered, ability and skill required, experience and reputation of counsel, results obtained, etc., are extremely important. The length of time devoted is persuasive, but this Court is not as impressed with the time-clock approach as it is with the other elements, particularly the results accomplished. Counsels' being precluded from other employment and fees customarily charged in this locality for similar legal services are also of great concern. Economy is essential, but the admonition on page 408 of *Jacobowitz, supra,* is vital, "The economical spirit of the Bankruptcy Act is one of the considerations going into the determination of reasonable fees in bankruptcy cases, but is only one consideration to be weighed and valued along with others."

In summary, attorneys for the debtor requested $180,000.00 and are allowed $162,500.00; attorneys for debtor-in-possession requested $200,000.00 and are awarded $197,500.00, to be disbursed accordingly.

IT IS SO ORDERED.

Dated this 17th day of July, 1972.

/s/ WILLIAM J. O'NEILL
Bankruptcy Judge

STATUTES, GENERAL ORDERS IN BANKRUPTCY, AND BANKRUPTCY RULES

11 U.S.C. Chapter 1—Definitions

§ 1. Meaning of words and phrases

The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(9) "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;

(10) "Courts of bankruptcy" shall include the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable;

11 U.S.C. Chapter 2

§ 11. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * * * *

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

* * * * *

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section 76 of this title;

11 U.S.C. Chapter 5

§ 76. Receivers; marshals, and trustees; compensation

(a) The compensation of receivers appointed under this title, for their services payable after they are rendered, shall be as follows:

* * * * *

(2) With full powers. Receivers appointed pursuant to clause (3) of subdivision (a) of section 11 of this title who serve otherwise than as mere custodians shall receive compensation by way of commissions upon the moneys

disbursed or turned over to any persons, including lienholders, by them and also upon the moneys turned over by them or afterward realized by the trustees from property turned over in kind by them to the trustees, such amount as the court may allow, but in no event to exceed 6 per centum on the first $500 or less, 4 per centum on all in excess of $500 but not more than $1,500, 2 per centum on all above $1,500 and not more than $10,000, and 1 per centum on all above $10,000.

(3) Conducting business. Receivers appointed pursuant to clause (3) of subdivision (a) of section 11 of this title who conduct the business of the bankrupt as provided in clause (5) of subdivision (a) of section 11 of this title, shall receive such amount as may be allowed by the court, but in no event to exceed twice the maximum allowance permitted by paragraph (2) of this subdivision.

11 U.S.C. Chapter 11

§ 731. Reference to referee

The clerk shall, unless the judge or judges direct otherwise, refer the proceeding to a referee.

July 1, 1898, c. 541, § 331, as added June 22, 1938, c. 575, § 1, 52 Stat. 908, and amended Aug. 23, 1958, Pub.L. 85-732, § 2, 72 Stat. 820; June 23, 1959, Pub.L. 86-64, § 4, 73 Stat. 109.

* * * * *

§ 732. Appointment of receiver or continuance of trustee in possession

The court may, upon the application of any party in interest, appoint, if necessary, a receiver of the property

of the debtor, or, if a trustee in bankruptcy has previously been appointed, shall continue such trustee in possession.

* * * * *

§ 743. Operation of business and management of property; reports

The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

U.S.C. Title 28 Rules—Supreme Court—General Orders in Bankruptcy

Order 44. Appointment of Attorneys

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employ-

ment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

* * * * *

Order 56. Rules by Courts of Bankruptcy

Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be distributed by the clerk of the district court as follows: Two copies to the Library of the Supreme Court of the United States, Washington 25, D. C.; two copies to the

Director of Libraries, Department of Justice, Washington 25, D. C.; two copies to the Comptroller General, General Accounting Office, Washington 25, D. C.; and four copies to the Administrative Office of the United States Courts, Washington 25, D. C.

U.S.C. Bankruptcy Rules, Supreme Court of the United States

Rule 927. Local Bankruptcy Rules

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedure under the Act not inconsistent with these rules. Copies of rules and amendments so made shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of such rules available to members of the public who may request them. In all cases not provided for by rule, the district court may regulate its practice in any manner not inconsistent with these rules.

Rule 928. Jurisdiction Unaffected

These rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter.

Bankruptcy Rules of the United States District Court Northern District of Ohio

Rule 12. Compensation of Attorneys

(a) A detailed statement shall be attached to each application for attorney fees, showing the items of service rendered, with the charge and date for each item, unless in any given case a judge of the court finds that such itemization is not practicable and directs that it may be dispensed with. Every applicant must file an affidavit with each such statement swearing that every item in the statement is true, complete and accurate, according to his personal knowledge and belief.

(b) Objections to the allowance of the attorney fees applied for shall be made at or before the time set for hearing thereon.

(c) Among the factors to be taken into consideration in determining the compensation to be allowed to attorneys entitled thereto by law are the following:

1. The amount of work done.
2. The difficulties or intricacies of the problem presented.
3. The skill required and experience of counsel in similar cases.
4. The results accomplished.
5. The amount involved in connection with the services rendered.
6. The size of the estate.
7. The length of time consumed.
8. Contingency or certainty of compensation.

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